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THE
DUTIES OF SHERIFFS,
CORONERS AND CONSTABLES

WITH
PRACTICAL FORMS.

BY JOHN G. CROCKER,
COUNSELLOR AT LAW.

SECOND EDITION, REVISED AND ENLARGED.

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PREFACE TO THE SECOND EDITION.

THE first edition of *The Duties of Sheriffs, Coroners and Constables*, has been out of print for some time. But the many changes and additions to our statutes affecting the powers and liabilities of these officers, since its publication, would have made a new edition necessary. It has been sought to render the present revision as thorough and complete as could be, without making the work too voluminous for ready use. The errors and omissions which time has disclosed in the former edition have been corrected and supplied, and much that is new, drawn from such subsequent legislation and the decisions of the courts, has been added. The titles of the cases referred to are now given in full, and a table of these cases is prefixed; while the index which was intended to be a complete analysis of the work has many new heads added, and its arrangement improved, to give greater facility for reference. There have also been added very full references to the decisions of the courts of the other States. These cases show great uniformity in the general principles which regulate the conduct of Sheriffs, Coroners and Constables in the discharge of their duties throughout the Union—the consequence of the offices as well as the practice having a common origin. Changes, however, have been made by legislative enactments in the different States, too frequent, and extending over too many of the States to be given in detail, but to which reference is made throughout the volume. These additions, it is believed, will render the present edition of much more general use than the former one, and as much so as a work of this description can be.

Utica, December 15, 1870.



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THE DUTIES OF SHERIFFS.

CHAPTER I.

OF THEIR ELECTION, QUALIFICATIONS AND ENTERING UPON THEIR DUTIES.^a

§ 1. There shall be elected, at the general election, a sheriff for each county in this State, by the electors thereof, respectively, once in every three years, and as often as vacancies shall happen.¹ On the erection of a new county, the sheriff shall be chosen at the general election succeeding the erection of such county, or at such other time as the legislature shall direct.² When the board of county canvassers shall have determined who is elected to the office of sheriff, the county clerk shall prepare and certify a copy of such determination, and shall, without delay, deliver the same to the person so elected.³ The person so chosen shall enter upon the duties of his office, except where he is chosen to fill a vacancy then existing, on the first day of January following the election at which he is chosen.⁴ He shall hold his office for three years, whether he is elected at the close of a full

¹ Cons. Art. X., § 1; 1 R. S. 69; Id. 419, § 9.

² 1 R. S. 401, § 89.

³ 1 R. S. 429, § 21.

⁴ 1 R. S. 408, § 3.

^a Ala.—R. C. 1867, §§ 148, 153, 216, 814, 815, 816, 873; Laws 1868, p. 7.

Ark.—Dig. 1858, pp. 841, 1021.

Cal.—Dig. 1860, pp. 558, 678.

Conn.—Rev. 1866, p. 669.

Del.—R. S. 1852, pp. 72, 89.

Fla.—Dig. 1847, pp. 60, 203–218.

Ga.—Code, p. 86.

Ill.—2 St. p. 1122, 1124; Cons. Art. 7.

Ind.—1 R. S. 1852, p. 166; 2d Id., p. 4; Laws 1855, p. 52.

Ia.—Rev. 1860, p. 64; Laws 1866, p. 4.

Kan.—Gen. St. 1868, p. 277.

Ky.—2. R. S. 339.

La.—R. S. 523.

Me.—R. S. 483.

Md.—1 Code, 595.

Mass.—St. 1860, pp. 38, 70.

Mich.—St. 1857, pp. 205, 209.

Minn.—Rev. 1866, p. 127.

Miss.—Rev. Code, 71, 120; Laws 1858, p. 150.

Mo.—Gen. St. 1865, p. 156.

Neb.—R. S. 1866, pp. 29, 376, 552, 558.

Nev.—St. 1866, p. 233.

N. H.—Gen. St. 1867, p. 64.

N. J.—Dig. 1855, pp. 108, 748.

N. C.—Rev. Code, pp. 442, 444, 445, 557; Laws 1869, p. 596.

O.—2 R. S., 1399, 1403.

On.—Gen. L., 388, 393, 394.

Penn.—Dig. 1861, p. 893; Laws 1862, p. 431.

R. I.—R. S. 416.

Tenn.—Cons. Art. 7, § 1; Code, pp. 140, 233.

Tex.—Cons. Art. 4, § 19.

Vt.—Cons. Art. 15, of Am'dts; Gen. St. 1863, p. 89.

Va.—Code 1849, p. 245; Laws 1862, p. 64.

W. Va.—St. 1863, p. 7.

Wis.—Cons. Art. 6, § 4; R. S. 161, 171, Laws 1865, p. 507; 13 Wis. Hubbard v. Saxton.

term of the office, or to fill a vacancy;¹ and he may continue to discharge the duties of his office after the expiration of his term, until he shall have been served with the certificate of the county clerk, that his successor has duly qualified.²

§ 2. No person shall be capable of holding the office of sheriff, who at the time of his election or appointment shall not have attained the age of twenty-one years, and who shall not then be a citizen of this State;³ and he must reside in the county for which he is chosen.⁴ He can hold no other office.⁵ And neither he nor his under sheriff, deputy, or clerk or any coroner shall, during his continuance in office, practise as counsellor, solicitor or attorney, in any court of law or equity.⁶ He cannot be bail in any action,⁷ nor can he or his deputy execute process in any suit, action or proceeding in which he is a party, or in which he is interested, though he is not a party to the record.⁸ In such case the process must be executed by the coroners of the county, or one of them, or the court may, in certain cases, appoint elisors to execute such process.⁹ But the fact that one of the sheriff's deputies is a party to a suit, does not make the sheriff interested in, or a party thereto, so as to require the service of the process to be made by the coroner. Nor does it make any difference that such action is for an act done by such deputy in his office.¹⁰ The sheriff, or any of his deputies, may serve process in which any other of his deputies is a party; but no deputy can serve process in which he himself or the sheriff is a party, or interested in.¹¹ The sheriff or other officer and the deputy of such sheriff or officer, or any constable holding any execution and conducting any sale of property in pursuance thereof, shall not directly or indirectly purchase any property whatever at any sale by virtue of such execution; and all purchases made by such sheriff, officer or deputy, or to his use, shall be void.¹² But this prohibition does not apply to a jailer or turnkey, unless he is also a deputy. And where a deputy is plaintiff in an execution, or interested therein, he may purchase property on a sale under it,

¹ 2 Wend. 266, *The People ex rel. Gallup v. Green*; 11 Wend. 132, 511, *The People ex rel. Bunn v. Coutant*.

² 1 R. S. 409, § 15; 3 R. S. 737, § 89; 12 Wend. 275, *Curtiss v. Kimball*; 21 Wend. 223, *Hinds v. Doubleday*.

³ 1 R. S. 407, § 1.

⁴ 1 R. S. 383, § 13.

⁵ Cons. Art. X., § 1; 1 R. S. 397, § 68.

⁶ 1 R. S. 401, § 85.

⁷ 20 John. 129, *Bailey v. Warden*.

⁸ 1 Kernan 61, *Carpenter v. Stillwell*; 15 John. 443, *Sherman v. Boyce*; 23 Wend. 314, *Mills v. Young*.

⁹ 3 R. S. 741, § 109; 3 R. S. 719, § 132; Code, § 419; 3 R. S. 643, §§ 11, 12.

¹⁰ 19 Pick. 339, *Commonwealth v. Moore*; 2 How. 26, *Stacy v. Farnham*.

¹¹ 1 Bailey (S. C.) 467, *Singletary v. Carter*; 2 Col. (Tenn.) 2, *Stewart v. Magness*; 26 Miss. R. 243, *Ford v. Dyer*; 17 Ill. 218, *Wood v. Gilson*.

¹² 3 R. S. 448, § 133; 3 R. S. 651, § 55; 4 Wend. 474, *Jackson ex d. Anderson v. Anderson*; 15 Ill. 145, *Wickliff v. Robinson*.

where such process is held by the sheriff or another deputy and the sale is conducted by them, to save his debt.¹ And the sheriff is ineligible to the office for the next three years after the close of his term of office.² But this limitation of the office to one term, does not apply to the case of a person appointed by the governor to perform the duties of the office during a vacancy therein.

§ 3. The name of the person elected to the office of sheriff, shall be entered by the secretary of state in a book to be kept in his office; specifying the county for which he is elected, his place of residence, the office for which he is elected, and his term of office.³ And before the sheriff enters upon the duties of his office, and within fifteen days after notice of his election by the county clerk or within fifteen days after the commencement of his term of office, he shall take and file with the county clerk the constitutional oath of office.⁴ And he shall within twenty days after such notice of his election, or⁵ before he enters upon the duties of his office, execute a joint and several bond to the people of this state in the penalty of \$20,000 with two sureties, if in the city of New York, and in the penalty of \$10,000 with two or more sureties, if any of the other counties of this state, which bond shall be filed with the clerk of the county for which such sheriff is chosen, within the same time he is required to take and file the oath of office. At the time of executing the bond, the clerk with whom the same is to be filed, shall administer an oath to each of the sureties thereto, that he is a freeholder within this state, and is worth, if in the city and county of New York, \$20,000; and if in any other county, such sum as shall be proportionate to the number of sureties bound in such bond, to the amount of the bond required in such county, over and above all debts whatsoever owing by him. Such oath must be endorsed on the bond, and be signed by each of the sureties in the presence of the clerk, who shall notwithstanding, judge and determine the competency of such sureties.⁶ Such security shall also be renewed within twenty days after the first Monday of January in each year, after such sheriff shall have entered upon the duties of his office. Such renewed security shall be in the same amount, and be given in the same manner, and be subject in all respects, to the same regulations as the original security required from such sheriff.⁷ If there be a vacancy in the office of

¹ 3 Cow. 89, Jackson ex d. Scofield v. Collins.

² Cons. Art. X., § 1; 1 R. S. 397, § 68.

³ 1 R. S. 442, § 43.

⁴ 1 R. S. 411, § 29 sub. 6; 1 R. S. 410, §§ 24, 25; 12 Wend. 481, The People ex rel. Westcott v. Holley.

⁵ 12 Wend. 481, The People ex rel. Westcott v. Holley.

⁶ 1 R. S. 876, §§ 162, 163, 164; 12 Wend. 481, The People ex rel. Westcott v. Holley.

⁷ 1 R. S. 877 § 165.

county clerk, or the county clerk be absent from the county, or be incapable of performing the duties of his office, it shall be lawful for the county judge to decide upon the competency of such sureties, and for that purpose to administer any oath and make any examination that may be required.¹

§ 4. Every bond executed by an officer pursuant to law, for the faithful discharge of the duties of his office, shall be deemed to be in force and obligatory upon the principal and sureties therein, so long as such officer shall continue to discharge the duties of his office, and until his successor shall be appointed and shall have duly qualified. But such sureties shall be exonerated from all liability by reason thereof, for all acts or omissions of the principal after he shall have duly renewed any such bond.² And any default or misfeasance of the under sheriff, while he acts as sheriff, during a vacancy in the office, as well as before, shall be deemed a breach of the condition of the sheriff's bond who appointed him.³

§ 5. If any person shall execute any of the duties or functions of any office, without having taken or subscribed the oath of office required by law, or without having executed or filed in the proper office any bond within the time required by law, he shall forfeit the office to which he may be elected or appointed, and shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment.⁴ In such case, however, so far as the rights of third persons and the public are concerned, he is an officer, *de facto*.⁵

§ 6. When the sheriff elect shall have taken the oath of office, and filed the bond required by law, the clerk of the county shall grant to him a certificate under his official seal, that he has so qualified and given such security; which certificate shall be served by the new sheriff upon the former sheriff, whereupon his powers as such sheriff, except when otherwise expressly provided by law, shall cease, and within ten days thereafter he shall deliver to his successor,

1. The jail, or jails, if there be more than one, of the county, with all their appurtenances and property of the county therein;

2. All the prisoners then confined in such jail;

3. All papers authorising or relating to the confinement of such prisoners, and if any such process shall have been returned, a statement of the contents thereof, and when returned;

4. All writs of *capias ad respondendum* and other *mesne* process,

¹ 1 R. S. 869, § 124.

² 1 R. S. 412, §§ 34, 35; 13 Wend. 448, *The People ex rel. Budd v. TenEyck*.

³ 1 R. S. 877, § 167.

⁴ 1 R. S. 412, § 36; Cons. Art. X., § 1; 33 Ala. R. 674, *Sprowl v. Lawrence*.

⁵ 1 Denio 575, *The People v. Hopson*.

and all precepts and other documents for the summoning of a grand or petit jury then in his hands, which shall not have been fully executed by him ;

5. All executions, attachments and final process then in his hands, except such as shall have been executed, or he shall have begun to execute, by the collection of money thereon, or by a levy upon property in pursuance thereof ;¹

6. When one is confined in jail, or on the limits on a *ca. sa.* at the time of such assigning and delivery of such jail, if such writ is not then returnable, it shall be delivered to the new sheriff, and shall be returned by him, with the proceedings of the old and the new sheriff thereon ;²

7. But the former sheriff shall return in his own name, all writs fully executed by him and shall complete the execution of all final process and attachments which he shall have begun to execute by the collection of money, or making a levy, pursuant to the direction thereof ;³

8. At the time of such delivery, the former sheriff shall execute an instrument in writing, reciting the property, process, documents and prisoners delivered, and specifying particularly the process and other authority by which each prisoner was committed and is detained, and whether the same is returned, or is delivered to such new sheriff. It is not necessary that the names of all the parties to the process delivered over, or by which a prisoner is held, should be given. It is sufficient that the new sheriff has notice of all the executions against a prisoner.⁴ And a notice of the prisoners by parol, or by writing, not by indenture, is sufficient if the new sheriff do not object.⁵ Such instrument shall be delivered to such new sheriff, who shall acknowledge on a duplicate thereof, the receipt of the property, process, documents and prisoners therein specified, and shall deliver such duplicate and acknowledgment to such former sheriff.⁶ If, at the time of the qualifying of the new sheriff, the office is vacant and the duties thereof are discharged by the under sheriff, a coroner or other person, such person so discharging the duties thereof, shall comply with the preceding provisions as to the delivery over of the jails and property,

¹ 3 R. S. 737, §§ 88, 89, 90 ; 21 Wend. 223, *Hinds v. Doubleday* ; 12 Wend. 275, *Curtiss v. Kimball* ; 5 Hill 228, *Wood v. Colvin* ; 10 Bosw. 566, *French v. Willet*.

² 3 R. S. 738, § 93.

³ 3 R. S. 738, § 92 ; 3 Cow. 89, *Jackson ex d. Scofield v. Collins* ; 3 Scam.

208, *Elkin v. The People* ; 3 Scam. 558, *Phillips v. Dana*.

⁴ 9 John. 86, *Tallmadge v. Richmond*.

⁵ *Watson on Sheriff* 20 ; *Sewell on Sheriff* 29.

⁶ 3 R. S. 737, § 91.

and perform the duties in respect thereto required of the former sheriff.¹

§ 7. If a prisoner confined on the limits, on civil process, is not assigned within ten days, he shall be at liberty to go at large. The new sheriff has nothing to do with him, and cannot even bring an action on a bond for the limits, and the power of the old sheriff is at an end.² And so if the old sheriff fails to mention in his list, one of his prisoners, or one of several detainers against a prisoner, and he escapes, the old sheriff and not the new one, is liable.³ The new sheriff shall be charged only with the prisoners of which the old sheriff gave notice.⁴ The new sheriff is only bound to receive prisoners from the old sheriff at the county jail, or at the place for the time used as the county jail; yet if the old sheriff deliver his prisoners to his successor, who receives them out of the jail, the old sheriff is discharged.⁵

§ 8. If the former sheriff, at the close of his term, or when he has been removed from office, refuses to deliver possession to the new sheriff, or to the person appointed to discharge the duties of the office, he will be guilty of a misdemeanor,⁶ and such successor may take possession of the jails, and the custody of the prisoners,⁷ and apply to a justice of the supreme court, or the county judge of the county where such late sheriff resides, to compel the delivery of the process and documents. If such judge is satisfied by the oath of the complainant, and such other testimony as shall be offered, that any such process or documents are withheld, he shall grant an order directing such late sheriff (or if he is dead, the person in whose hands the same may be,⁸) to show cause before him, within some short and reasonable time, why he should not be compelled to deliver the same. At the time appointed, on proof of the service of the order, such judge shall proceed to inquire into the circumstances; and if the person charged shall make affidavit before such officer that he has truly delivered over to the claimant all such process and documents in his custody and appertaining to the office, he shall be discharged.⁹ But if such person shall not make such oath, and it shall appear that any such process and documents are withheld, such judge shall, by warrant, commit such person to the county jail, there to remain until he shall deliver the same, or be otherwise discharged by law.¹⁰ In such case too, if

¹ 3 R. S. 738, § 95; 28 Barb. 613, *Ridge-way v. Barnard*.

² 21 Wend. 223, *Hinds v. Doubleday*; 10 Abb. 99, *French v. Willett*.

³ Sewell 29; Watson 20, 22.

⁴ Sewell 29.

⁵ Sewell 31; Watson 20.

⁶ 1 R. S. 416, § 62.

⁷ 3 R. S. 738, § 93.

⁸ 1 R. S. 417, § 68.

⁹ 1 R. S. 417, § 64, 68.

¹⁰ 1 R. S. 417, § 65, 68.

required by the claimant, such judge shall issue his warrant, directed to the sheriff or any constable, commanding him in the day-time, to search such places as shall be designated in such warrant, for such process and documents, and to seize and bring them before the officer issuing the warrant; and upon their being brought before him, he shall inquire and examine whether the same appertain to such office, and he shall cause the same to be delivered to such claimant.² But the title of the claimant to the office must be free from reasonable doubt before the judge can act, else the application to obtain possession of the office must be by *quo warranto*.³ And so if another person shall usurp, intrude into or unlawfully hold or exercise the office of sheriff, the attorney general may file an information in the name of the people, upon his own information, or upon the complaint of any private party,⁴ and if judgment be in favor of the claimant, he shall be entitled, after taking the oath of office and executing the official bond, to take upon himself the execution of the duties of the office; and it shall be his duty, immediately thereafter, to demand of the defendant, all the books and papers in his custody, or within his power, belonging to the office.⁵ If the defendant shall refuse or neglect to deliver over such books or papers pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had and with the same effect, to compel the delivery thereof as is above prescribed.⁶

CHAPTER II.

OF THEIR RESIGNATION AND REMOVAL FROM OFFICE. ^a

§ 9. The office of sheriff will become vacant on the happening of the death of the incumbent; on his resignation to the governor; on his removal from office; on his ceasing to be an inhabitant of his

¹ 1 R. S. 417, § 66.

² 1 R. S. 417, § 67.

³ 5 Hill 616, *The People ex rel. Worthinton v. Stevens*; 14 Barb. 396, *In Re Welch*.

⁴ Code § 432.

⁵ Code § 437.

⁶ Code § 438; 14 Barb. 396, *In Re Welch*.

^a Cal.—Dig. 1860, p. 559.

Conn.—Rev. 1866, p. 670.

Fa.—Laws 1868, p. 33.

Ga.—Dig. 1851, pp. 198, 212.

Ill.—2 St. 1123; 1 St. 388, 393.

Ind.—1 R. S. 1852, p. 223.

Ia.—Rev. 1860, p. 97, 101.

Kan.—Gen. St. 1868, p. 278.

Ky.—3 R. S., p. 464.

Me.—R. S., 483.

Mass.—St. 1860, pp. 75, 150.

Mich.—St. 1857, 219.

Minn.—Rev. 1866, p. 127.

Nev.—St. 1866, p. 237.

N. H.—Gen. St. 1867, p. 64.

N. J.—Dig. 1855, p. 748.

N. C.—Rev. Code, 557.

R. I.—R. S. 416.

Tenn.—Cons. Art. 7, § 2; Code, p. 140.

Vt.—Gen. St. 1863, p. 89.

Va.—Code, 1849, p. 248.

Wis.—R. S., 172; Laws, 1859, p. 77;

Laws 1864, p. 98.

county; on his conviction of an infamous crime, or of any offence involving a violation of his oath of office; his neglect or refusal to take the oath of office within the time required by law; or to give or renew any bond, within the time prescribed by law; or by the decision of a competent tribunal declaring void his election or appointment.¹ And so it will become vacant on his accepting another office the duties of which are incompatible with those of the office of sheriff.² And where a county is divided, and a part of the old county is set off and a new county formed with a new name, the sheriff or any coroner residing in the old county, will be entitled to hold and exercise the duties of their respective offices, within the limits of such part of the old county, during the remainder of their respective terms of office; but if the sheriff or any coroner resides within the new county, whether it be formed out of the old county exclusively, or of part of it and other counties, his office is gone.³

§ 10. The governor may declare the office of any sheriff vacant, whenever a judgment shall be obtained against him for a breach of the condition of his official bond.⁴ And so, where the sheriff is in custody thirty days, for the non-payment of moneys received by him by virtue of his office, he may be removed by the governor.⁵ He may also be removed by the governor on charges preferred against him, on giving him a copy thereof, and allowing him an opportunity of being heard in his defence, before any removal shall be made.⁶ When the governor shall have received any charges against any sheriff, and shall have served a copy thereof upon him, if the sheriff does not admit the truth, he should immediately make denial thereof, in writing, and serve the same upon the governor. Upon such denial being made, the governor may direct the district attorney of the county in which such sheriff shall be, to conduct an inquiry into the truth of the charges made, who shall give at least eight days notice to the accused of the time and place of hearing before the county judge.⁷ The district attorney may issue subpoenas in his own name to compel the attendance of witnesses whom he shall deem material, and such judge shall have power to enforce obedience thereto by attachment, and to commit any one who shall refuse to be sworn or to answer, as the county court would have in a criminal case pending therein.⁸ On the application of the accused to the district attorney or to any justice

¹ 1 R. S. 413, § 40; 1 R. S. 413, § 33; 1 R. S. 397, § 68; Cons. Art. 10, § 1.

² 2 Hill 93, *The People ex rel. Whitney v. Carrique*; 8 Cow. 212, *Paddock v. Cameron*.

³ 21 Wend. 563, *The People v. Morrell*.

⁴ 1 R. S. 414, §§ 46.

⁵ 1 R. S. 878, §§ 172.

⁶ 1 R. S. 414, § 51.

⁷ 1 R. S. 415, §§ 52.

⁸ 1 R. S. 415, §§ 53.

of the peace, he shall be entitled to the like process of subpœna, which may be enforced in the same manner by the county judge before whom the inquiry is pending.¹ At the time and place mentioned in the notice, such county judge shall proceed to take the testimony of the witnesses produced before him by the district attorney, or by the accused officer. The witnesses shall be sworn by such judge; every answer given by them to any question which either party shall require to be reduced to writing shall be written; their testimony shall be read to and subscribed by them and shall be certified by the judge taking the same, and be delivered to the district attorney to be transmitted by him to the governor.² Or instead of proceeding before the county judge, the testimony may be taken before the governor himself or a commissioner to be appointed by him for that purpose, in writing and filed in the office of the secretary of state. And he may supercede such appointment and appoint others whenever necessary. And the governor may in such case direct the district attorney of the county or the attorney general to conduct the inquiry; but all proceedings to be had as in such cases before the county judge; the governor or commissioners being clothed with all the power of the county judge in such cases. All false swearing is declared perjury and punishable as such; and all sheriffs, coroners and constables and marshals to whom process shall be directed and delivered under the act, are required to execute the same without any unnecessary delay.³

§ 11. And if any sheriff, jailer, coroner, marshal or constable, shall

1. Wilfully and corruptly refuse to execute any lawful process directed to them or any of them, requiring the apprehension or confinement of any person charged with a criminal offence; or,

2. Shall corruptly and wilfully omit to execute such process by which such person shall escape; or,

3. Shall wilfully refuse to receive in any jail under his charge, any offender lawfully committed to such jail, and ordered to be confined therein, on any criminal charge or conviction, or on any lawful process whatever; or,

4. Shall wilfully suffer any offender lawfully committed to his custody to escape and go at large; or,

5. Shall receive any gratuity or reward, or any security or engagement for the same, to procure, assist, connive at, or permit any prisoner in his custody, on any civil process, or on any criminal charge or conviction, to escape, whether such escape be attempted or effected or not:

¹ 1 R. S. 415, § 54.

³ 1 Laws, 1856, Ch. 629.

² 1 R. S. 415, § 55.

He shall, upon conviction, be punished by imprisonment in a county jail not exceeding one year; or by fine not exceeding \$1,000, or by both such fine and imprisonment, and shall forfeit his office and be forever disqualified to hold any office, or place of trust, honor or profit, under the laws or constitution of this state.¹ So a violation of the statutes concerning the "arrest of persons on civil process," and of the manner of confining prisoners in jail,² is declared to be a misdemeanor, and subjects the officer to indictment, and upon conviction thereof, in addition to any other punishment, he shall forfeit his office or place, and shall forfeit to the party aggrieved three times the damages found by the jury.³ A violation of the provision of the statute relative to the introduction of spirituous liquors in a county jail, is also declared a misdemeanor, and subjects the offender to imprisonment not exceeding one year, and to a fine not exceeding two hundred and fifty dollars, or both; and every sheriff or other officer so convicted, shall lose his office.⁴ And if he or any constable, marshal, coroner or other officer, shall, for any reward, consideration, a gratuity paid, agreed to be paid or reserved to be paid directly or indirectly grant to another the right, privilege or authority to discharge any duties of such office, either by permitting others to make appointments or to perform or discharge in any manner directly or indirectly the prerogatives or duties of such office shall upon conviction be declared guilty of a misdemeanor, and in addition to other punishments prescribed, shall forfeit his office and be forever disabled from holding such office; and every person who shall give or make any agreement to give any gratuity or reward in consideration of any such grant or deputation shall upon conviction be deemed guilty of a misdemeanor.⁵ But an agreement with a deputy sheriff, conditioned for his paying over to the sheriff, one half of his fees arising from the business done by him as such deputy, is not within the statute. It is otherwise however if the principal is to receive a gross sum which is not to come out of the office.⁶ And any officer receiving or consenting to receive any thing of value or advantage with the understanding that his official action is to be influenced thereby, is punishable as a felon.⁷

§ 12. In case of a vacancy in the office of sheriff, the under sheriff,⁸ or if there be no under sheriff, one of the coroners of the county,⁹ or person to be designated by the county judge¹⁰ shall discharge the

¹ 3 R. S. 965, §§ 21, 22.

² Art. 2, Tit. 6, Ch. 7, 3d Part, R. S.; 3 R. S. 723; 3 R. S. 725, §§ 8, 9, 10.

³ 3 R. S. 725, §§ 11.

⁴ 3 R. S. 728, §§ 31.

⁵ 3 R. S. 977, §§ 37, 38, 39; 4 R. S. 660 and Laws, 1863, Ch. 51, § 1.

⁶ 1 Hill 21, *Mott v. Robins*; 3 Minn. R.

413, *Pioneer Pr. Co. v. Sanborn*; 18 Ind. R. 390, *Hale v. Gavitt*; 17 Wis. R. *Addington v. Sexton*.

⁷ Laws 1869, Ch. 742.

⁸ 1 R. S. 877, § 167.

⁹ 1 R. S. 778, § 173.

¹⁰ 1 R. S. 879, § 177.

duties of sheriff until the governor shall appoint some fit person who is eligible to the office, to execute the duties thereof.¹ Such person, so appointed by the governor, shall discharge the duties of such office until the commencement of the political year succeeding the general election after his appointment. But he may be removed by the governor, before the expiration of such time, without cause, and he may appoint another person in his place.² When there shall be a failure to elect a sheriff at a regular election, by reason of two or more candidates having an equal number of votes; or where the right of office of the sheriff shall cease before the commencement of the term of service for which he was elected, a sheriff shall be chosen at a special election.³ If any vacancy be not supplied at the general election next succeeding the happening thereof, a special election shall be had. In case of a failure to elect, by reason of two or more candidates having an equal number of votes, the special election shall be ordered by the board of county canvassers. In the other cases, the election shall be ordered by the governor, who shall issue his proclamation therefor, in which he shall specify the county where such election is to be held; the cause of such election; the name of the officer in whose office the vacancy has occurred; the time when his office will expire and the day on which such election shall be held, which shall not be less than twenty nor more than forty days from the date of the proclamation.⁴

CHAPTER III.

OF THE UNDER SHERIFF, DEPUTIES AND JAILERS.^a

§ 13. Every sheriff shall, as soon as may be, after he takes upon himself the duties of his office, appoint some proper person under-

¹ 1 R. S. 415, §§ 56, 59.

² 1 R. S. 415, § 56; 6 Hill 49, *The People ex rel. Faxton v. Parker*.

³ 1 R. S. 420, § 8.

⁴ 1 R. S. 420, §§ 9, 10, 11.

^a Ala.—R. P., 1867, §§ 817, 873.

Ark.—Dig. 1858, p. 1021.

Cal.—Dig. 1858, p. 678.

Conn.—Rev. 1866, p. 672.

Fa.—Dig. 1847, p. 61.

Ga.—Code, p. 86.

Ill.—St. 1124; Laws 1857, p. 56, Laws 1869, p. 399.

Ia.—Rev. 1860, p. 98.

Ky.—2 R. S. 340.

La.—R. S. 523.

Me.—R. S. 483; Laws, 1863, p. 130.

Mass.—St. 1860, p. 150.

Mich.—St. 1857, 206.

Minn.—Rev. 1866, p. 129.

Miss.—Rev. Code, 122.

Neb.—R. S. 377.

Nev.—St. 1866, 236.

N. H.—Gen. St., 1867, p. 400.

N. J.—Dig. 1855, p. 748.

O.—1 R. S., p. 500.

On.—Gen. L., 338.

R. I.—R. S. 416.

Tenn.—Code, pp. 140, 735.

Tex.—Cons. Art. 4, § 19.

Vt.—Gen. St. 1863, p. 86.

Va.—Code, 1849, p. 249; Laws, 1858 p. 32.

W. Va.—St. 1866, p. 16.

Wis.—R. S., 162; 171.

sheriff; and as often as a vacancy shall occur in the office of under sheriff, or the person so appointed becomes incapable of executing the duties of the office, another person shall be appointed in his place.¹ The sheriff cannot appoint more than one under sheriff at a time, yet he may appoint as many general deputies as he may think proper.² The sheriff, and the under sheriff may also, in writing, depute persons to do particular acts.³ But they cannot authorize others to appoint persons to do official acts; nor can a general deputy authorize another to execute a warrant. Nor can the sheriff or under sheriff depute a person to do any of those acts which the sheriff, or his under sheriff, or a general deputy is required to do in person; as attending upon the drawing of grand and petit juries; for in such cases either the sheriff, or the under sheriff, must be present in person. Nor can they appoint any one to convey a prisoner to the state prison, or to the house of refuge. This can only be done by the sheriff, under sheriff, or a general or usual deputy. Though the sheriff may appoint persons to do particular acts, he cannot appoint an under sheriff or a deputy, to execute a part of the office, and reserve the residue of the duties to be discharged by himself. And any covenant in the deputy's bond, limiting his powers to the service of particular process, and the like, would be void in respect to such covenant;⁴ and if the deputy should violate it, and make an arrest in a case prohibited by it, he would nevertheless be liable for suffering an escape.⁵

§ 14. The under sheriff and general deputies are officers, and are within the provisions of the statute relating to the appointment and resignation of officers,⁶ and they must possess the same qualifications as the sheriff himself.⁷ They must be appointed by writing, under the hand and seal of the sheriff, and such appointment must be filed, and recorded in the office of the clerk of the county; and every such under sheriff or deputy shall, before he enters upon the execution of the duties of his office, take the oath of office prescribed by the constitution. But the appointment of a special deputy, or the deputising one to do a particular act, though such appointment or deputation must be in writing, it need not be under seal, nor be filed with the clerk of the county; nor need such special deputy take the oath of office.⁸ The jailer is but a servant of the sheriff, and is not an officer,⁹

¹ 1 R. S. 877, § 166.

² 10 Paige 230, Boardman v. Halliday.

³ 1 R. S. 877, § 168; 41 Ala. R. 399, Kavanaugh v. The State; 2 Doug. (Mich.) 1, People v. Moore.

⁴ 16 Ala. N. S. 536, Perkins v. Reed; 2 Yerger (Tenn.) 337, Montgomery v. Scotland.

⁵ Watson, 31.

⁶ 11 Barb. 91, Gilbert v. Luce.

⁷ Ante, § 2.

⁸ 1 R. S. 877, § 169.

⁹ Impey on Sheriff, 67; Sewell, Id. 52, Watson Id. 40.

and it is not necessary therefore, that he should possess the qualifications required of the sheriff or a deputy; or that he should be appointed by writing; or that he should take the oath of office. It is usual, however, to appoint a jailer a deputy also; and in such case his appointment and bond to the sheriff may include the place of jailer as well as the office of deputy.

§ 15. The under sheriff,¹ general deputies, and jailers, hold their respective appointments during the pleasure of the sheriff; and they may be removed by him, at any time, and others appointed in their stead.² The removal may be a notice in writing and need not be under seal.³ They may resign to the sheriff, and such resignation need not be under seal; and when tendered, the sheriff is bound to accept it, and the office becomes vacant.⁴ And after their resignation, or removal from office, or after they have vacated the office, in any other manner, they can do no act to bind the sheriff or other parties.⁵ After the resignation of a deputy has been accepted by the sheriff, the sureties of such deputy ceases to be liable, on his bond, for any future acts or omissions of such deputy, though he is allowed to remain in the office without a new appointment or taking the oath of office again; and especially, if in such case the sheriff takes a new bond with sureties from such deputy.⁶ And the death, removal from office or resignation of the sheriff, vacates the office of all the general and special deputies, jailers and turnkeys,⁷ but it is otherwise with the under sheriff. The absconding of the sheriff, it has been held, did not vacate the office; but the deputies might continue to act.⁸

§ 16. The powers and duties of the under sheriff are, in some respects, more extensive than those of a deputy. Thus he may, like the sheriff, depute persons to do particular acts.⁹ In the absence of the sheriff, he must attend upon the drawing of juries for the courts of his county.¹⁰ And he must attend, in the absence of the sheriff, upon the execution of a criminal.¹¹ Whenever a vacancy shall occur in the office of sheriff, the under sheriff of such county shall, in all things, execute the office of sheriff of the county, until a sheriff shall be elected or appointed and qualified.¹² In all other respects, the under sheriff is upon an equality with the general deputies.¹³

§ 17. The appointment of under sheriff, and general deputies, con-

¹ 1 R. S. 877, § 166.

² 1 R. S. 409, § 13.

³ 31 N. Y. 445, *Edmonds v. Barton*.

⁴ 11 Barb. 91, *Gilbert v. Luce*; 1 R. S. 413, § 38, sub. 6.

⁵ 9 Wend. 258, *Ferguson v. Lee*.

⁶ 11 Barb. 91, *Gilbert v. Luce*.

⁷ 10 Paige 230, *Boardman v. Halliday*.

⁸ 22 Ill. 161, *Owens v. Ranstead*.

⁹ 5 John. 137, *Hunt v. Burrell*; 1 R. S. 877, § 168; Ante § 13

¹⁰ 3 R. S. 712, § 92.

¹¹ 3 R. S. 938, § 27.

¹² 1 R. S. 877, § 167.

¹³ 2 John. 63, *Tillotson v. Cheetham*.

fers on them the power to execute all the ministerial duties of the sheriff, (including the executing a writ of inquiry,¹) except attending upon the execution of a criminal, or upon the drawing of a grand or petit jury. In these cases the sheriff, or the under sheriff, must attend in person.² But all the acts of such under sheriff, (except while he is executing the duties of the office during a vacancy therein,) and of deputies, must be done by them in the name of the sheriff, their principal. The under sheriff and deputies may, like the sheriff, complete the execution of process, sell goods or lands on execution, and execute a deed therefor, though the term of office of the sheriff has expired, if they had begun to execute the same, by the collection of money or making a levy pursuant to the direction thereof, before the term of office of the sheriff expired.³ But if the under sheriff, or a deputy resigns, or is removed from office, or removes from the county, or does any other act by which his office is vacated, the execution of process in his hands must be completed by the sheriff, under sheriff or another deputy.⁴ And if the sheriff dies, or resigns, or is removed from office, or otherwise vacates it, before the expiration of his term, the execution of process in the hands of the sheriff, or any of his deputies, must be completed by the under sheriff. Neither an under sheriff, (except when he discharges the duties of the office during a vacancy, when the sheriff is liable on his bond for his acts,⁵) nor a deputy, can do any act to affect the sheriff, after the relation between them has ceased.⁶

§ 18. The under sheriff, general deputies and jailers, give to the sheriff such bond, in such penalty, and with such sureties as the sheriff may think proper; conditioned for the faithful discharge of their respective duties. Such bond should be executed and delivered before such under sheriff or deputy should be permitted to perform any official act under his appointment, as his surety would not be liable for any acts done before the giving of the bond. And while it is the duty of the sheriff to see that the deputy discharges his duty promptly and properly, he should avoid unnecessarily interfering with, or controlling him in the proper execution of process, as he may thereby release the deputy as well as his surety from all responsibility. But to exonerate them in such case, the instructions of the sheriff must

Watson 30; 2 John. 63, Tillotson v. Cheatham.

² Ante §§ 13, 16.

³ Ante § 6; 9 Cow. 223, Jackson, ex d. Hills v. Tuttle; 6 Wend. 213, Tuttle v. Jackson ex d. Hills; 3 Cow. 89, Jackson ex d. Scofield v. Collins;

20 Wend. 602, The People ex re'. Woolley v. Baker.

⁴ 6 Wend. 213, Tuttle v. Jackson, &c.; 9 Wend. 258, Ferguson v. Lee; Ante § 15.

⁵ Post § 22.

⁶ 7 Mass. 505, Blake v. Shaw; Ante § 15

be clear and explicit; and a communication of mere information and advice will not have that effect. To excuse the deputy, the instructions of the sheriff must be so definite and specific as to deprive him of all discretion in the matter.¹ The sheriff will not discharge the sureties of his deputy by neglecting or delaying his removal at the request of the sureties, not even where the deputy has become insolvent, and his removal is asked for on that ground.² But after a deputy has resigned his office, his bail cease to be liable for future acts done by him, if he is allowed to act, without a new appointment or taking the oath of office anew, especially if a new bond has been given.³ But a bond, in proper form, will be binding upon the undersheriff and deputy so long as they continue to act, as such undersheriff or deputy, whether before or after the termination of the office of their principal; and in the case of the undersheriff, he and his sureties will be liable on his bond to the sheriff, for acts done by him, when discharging the duties of the office, during a vacancy therein.⁴ As the sheriff is liable to third parties, for any default or misfeasance of a special deputy appointed by him, he should require an undertaking, or indemnity from the person for whose convenience, or at whose request, he is appointed.⁵

§ 19. A deputy is liable criminally, like the sheriff himself, and in the same cases, for any violation of duty prescribed by law; for the commission of any act prohibited; for the abuse of any process in his hands; for extortion, or the taking of illegal fees. He, as well as the sheriff, is also liable in an action at the suit of the party aggrieved, for any unlawful interference with the rights or property of another, and the action may be maintained against such deputy, or the sheriff, or both.⁶ But an action cannot be maintained directly against the deputy, by the party aggrieved, for a mere breach of duty in his office; as for refusing or neglecting to make an arrest, nor for refusing to discharge one on bail; nor for taking insufficient bail; nor for an escape; nor for neglecting or refusing to make a levy; nor for neglect to return process; nor for a false return;⁷ nor for refusing to pay over money received on an execution, or on the redemption of lands sold, unless, in such last case, he has made himself personally liable by his clear and absolute promise to pay. If the breach of duty on the part of the deputy is referable to a breach of the official duty of the sheriff, he, and not the deputy, is liable to the

¹ 15 Wend. 274, Tuttle v. Cook.

² 9 Cow. 693, Andrews v. Bealls; 11 Wend. 27, Barnard v. Darling.

11 Barb. 91, Gilbert v. Luce; Ante §15.

⁴ 1 R. S. 877, § 167; Ante § 4; Post §22

⁵ Allen 87.

⁶ 45 Barb. 154, Pond v. Leman.

⁷ 8 Cow. 212, Paddock v. Cameron.

party aggrieved. But the deputy is liable, in all such cases, upon his bond to the sheriff.¹

§ 20. The jailer is not a deputy. He is but the servant of the sheriff, who is responsible for his conduct. He is not, like a deputy, prohibited from purchasing at a sale by the sheriff.² If no bond is taken from him for the proper discharge of his duties, he is, notwithstanding, liable on his implied undertaking to serve the sheriff with diligence and fidelity; as where a negligent escape occurs.³ His business is to keep safely all such persons as are committed to his custody by lawful warrant; and if he suffer any to escape, the sheriff shall answer, if it be in a civil case;⁴ but if the person escaping be confined on a criminal charge, the jailer, and not the sheriff, is answerable; for the sheriff is liable to an action, but not to an indictment, for the default of his officer in suffering a voluntary escape.⁵

§ 21. The sheriff may allow his subordinate officers such compensation as shall be agreed upon, either by way of salary, or by allowing them a portion of the perquisites to which he is entitled, as the principal; and he may contract with his under sheriff and deputies for the discharge of the duties of their several trusts, either for a specific compensation, or for a reasonable proportion of the fees and emoluments arising from the performance of such duties; and such agreement may be a part of the bond of such under sheriff or deputy to the sheriff.⁶ But an agreement of a deputy to allow his principal a sum in gross, not payable out of the profits of the office, and which, therefore, may exceed its profits, is a violation of the statute which prohibits the buying and selling office. And so, where a deputy is by law entitled to certain fees in virtue of his character merely, if he agrees to give to the officer appointing him a portion thereof, it is a purchase of the deputation, and the parties are guilty of a violation of the statute against buying and selling office.⁷ But all official acts done before a conviction for any offence prohibited by the statute, shall be valid.⁸

§ 22. As has been already said, whenever a vacancy shall occur in the office of sheriff of any county, the under sheriff of such county shall, in all things, execute the office of sheriff of the county, until a

¹ 2 Com. 126, *Colvin v. Holbrook*; 7 John. 470, *Tuttle v. Love*; 3 Barb. 475, *Colvin v. Holbrook*; 19 Mo. 369, *The State v. Moore*; 12 Ia. 346, *Brayton v. Town*; 34 N. H. 261, *Perkins v. Pitman*; 46 N. H. 163, *Stevens v. Colby*.

² 4 Wend. 474, *Jackson ex d. Anderson v. Anderson*.

³ 8 John. 159, *Kain v. Ostrander*.

⁴ Sewell 52; *Watson* 40.

⁵ Sewell 53, 54; *Watson* 41.

⁶ 1 Hill 21, *Mott v. Robbins*; 3 Minn. 413, *Pioneer Pr. Co. v. Sanborn*; 18 Ind. 390, *Hale v. Gavitt*; 17 Wis. 327, *Addington v. Saxton*.

⁷ 1 Hill 21, *Mott v. Robbins*; 6 Paige 68, *Becker v. TenEyck*; 9 Wend. 175, *Tappan v. Brown*; 3 R. S. 977, §§ 37, 38, 39.

⁸ 3 R. S. 977, § 39.

sheriff shall be elected or appointed and duly qualified ;¹ but it is otherwise with respect to the general deputies. Their powers, as such, cease whenever those of their principal cease ; and all process then in the hands of such sheriff, the execution of which has been commenced, must be completed by the under sheriff.² In such case too, the under sheriff executes all new process, in the same manner as the late sheriff could execute the same, until a sheriff is elected, or appointed, and qualified, when he must deliver over the office to such person, in the manner, and within the time prescribed for the delivering over by the old to the new sheriff.³ The under sheriff, while so executing the duties of the office, during a vacancy therein, may appoint general and special deputies to aid him in the discharge of such duties. But the general deputies of the old sheriff, who has vacated his office by death, resignation, or removal from office, are not authorized to discharge the duties of general deputies of the under sheriff without a new appointment by such under sheriff. Such appointment must be in writing, under seal, and be recorded with the county clerk, and the deputy must take the oath of office in the same manner as upon the original appointment by the sheriff.⁴ Any default or misfeasance in the office of such under sheriff, in the meantime as well as before, shall be deemed to be a breach of the condition of the bond given by the sheriff who appointed him, and also a breach of the condition of the bond executed by such under sheriff to the sheriff by whom he was appointed.⁵

CHAPTER IV.

OF THE POWERS AND DUTIES OF SHERIFFS. *a*

§ 23. It shall be the duty of the sheriff of every county, to keep an office in some proper place, in the city or village in which the county

¹ 1 R. S. 877, § 167.

² 18 John. 120, *Ward v. Story* ; Ante § 17.

³ Ala.—R. C. 1867, §§ 818, 917–920, 1482–1520.

Ark.—Dig. 1858, p. 1021.

Cal.—Dig. 1860, pp. 234, 273, 678.

Conn.—Rev. 1866, p. 671 ; Laws 1859, p. 15.

Ill.—1 St. 144 ; 2 St. 16, 26 ; 2 St. 1223.

Ia.—Rev. 1860, pp. 64, 775.

Kan.—Gen. St. 1868, p. 279.

La.—R. S. 523.

Me.—R. S. 484 ; Laws 1858, p. 44.

Md.—1 Code 597, 604.

Mass.—St. 1860, p. 150.

Mich.—St. 1857, 110, 206, 304 ; Laws 1861, p. 303 ; 1862, p. 34.

³ 3 R. S. 738, § 95.

⁴ 10 Paige 230, *Boardman v. Halliday*.

⁵ 1 R. S. 877, § 167.

Minn.—Rev. 1866, p. 127, 209, 428, 431.

Miss.—Rev. Code pp. 123, 489 ; Laws 1867, p. 8.

Neb.—R. S. 376, 548.

Nev.—St. 1866, p. 247.

N. J.—Dig. 1855, p. 748.

N. C.—Rev. Code 537.

O.—Sup't. R. S. 575.

On.—Gen. L. 388,

R. I.—R. S. 416.

Tenn.—Code p. 855.

Vt.—Gen. St. 1863, p. 86.

Va.—Code 1849, p. 251.

Wis.—R. S. p. 162, 678, 835.

courts are held, of which he shall file a notice in the office of the clerk of the county. If there be more than one place of holding courts, the notice shall specify in which his office will be kept, or it may specify that an office will be kept in all such places if he thinks proper.¹ Such offices shall be kept open every day in the year, except Sundays and the anniversary of American independence, in each county, and in Albany and Kings, Thanksgiving day, Christmas day, and New Years day are also exceptions; and they shall be kept open in each of the counties except New York and Kings, from nine to twelve o'clock in the forenoon, and from two to five in the afternoon; and in Kings and New York, from nine o'clock in the forenoon to four in the afternoon.² Every notice or other paper which shall be required to be served on any sheriff, may be served by leaving the same at the office designated by him in such notice, during the hours in which it is required to be kept open; but if any person belonging to such office be therein, such notice or paper shall be delivered to such person; and every such service shall be deemed equivalent to a personal service on such sheriff.³ If no notice shall be filed by any sheriff with the county clerk, as herein required, the service of all papers on such sheriff may be made by leaving them at the office of the county clerk, with such clerk or his deputy; and the same shall be deemed equivalent to a personal service on such sheriff.⁴

§ 24. The sheriff's have authority to insure the jails of their respective counties, in behalf of the county, and also the court houses in the cases where they have the care and custody of them.⁵

§ 25. Every sheriff, like the coroners, constables and marshals of his county, is a conservator of the peace within his county, and as such is bound to suppress an affray, or arrest a breaker of the peace in his view, and bring him before a magistrate.⁶ But he has not the power to offer rewards for the apprehension of criminals and bind the county.⁷ And so it is his duty, when required, to execute all criminal process, judgments and orders of every court or officer having criminal jurisdiction in this state, including the process of courts of oyer and terminer and jail delivery of other counties, when issued to his own county.⁸ He is also required to serve the subpoenas of district attorneys of other counties, upon witnesses in his own county.⁹ Also, subpoenas issued by boards of supervisors¹⁰ and execute attach-

¹ 3 R. S. 475, § 43.

² 3 R. S. 476, § 44; Id. 475, § 42; Id. 481, § 86.

³ 3 R. S. 476, § 45.

⁴ 3 R. S. 476, § 46.

⁵ 1 R. S. 858, § 54.

⁶ 3 Wend. 384, Taylor v. Strong.

⁷ 21 Ill. 288, County of Crawford v. Sperry; 10 Iowa 591, Rockwell v. Monroe county.

⁸ 3 R. S. 299, § 27.

⁹ 3 R. S. 1021, 67.

¹⁰ 1 R. S. 853, § 21.

ments against witnesses charged with contempt in not appearing before committees of common councils.¹ The sheriff is also the keeper of the jails in his own county, except in New York, where he is only the keeper of the prison for the confinement of persons committed on civil process;² and in Onondaga county, where the keeper of the penitentiary is the county jailer;³ and in Albany county where persons sentenced to confinement at hard labor, or to solitary confinement, except in cases of felony, are to be sent to the penitentiary of such county;⁴ and in Kings county, where the keeper of the jail is appointed by the board of supervisors instead of the sheriff. But the sheriff has the same power as in other counties of taking the prisoners in such jail to and from the jail, when required or authorized by law; and in confining prisoners on civil process therein; for which last purpose he has the exclusive custody of a suitable portion of the said jail.⁵ And all sheriffs, jailers and constables, are required to execute every precept issued by the president of any court martial for compelling the attendance of witnesses, or to be sworn and testify, and to preserve order.⁶

§ 26. In civil matters, the sheriff is the immediate officer of every court of record in the state, including the surrogate's court,⁷ to whom all writs and process are regularly directed, and he is bound to execute the same. He is to serve the writ or order for arrest, and take bail, summon the jury, and through him the court enforces obedience to its orders and punishes for contempts; and when a cause is determined, he sees that the judgment of the court is carried into effect.⁸ He may hold courts to execute writs of inquiry, and such special writs as may be directed to him, pursuant to any statute, and to inquire into any claim of property seized or levied on by him; but he is not authorized to hold any other court for any purpose whatever.⁹

§ 27. The sheriff is authorized to administer an oath to one who claims exemption from arrest on the ground that he is a witness in a cause;¹⁰ also to appraisers who appraise the property of an absconding, non-resident or concealed debtor, and to jurors and witnesses on the execution of writs of inquiry; to the jury in the case of the appraisal of a homestead,¹¹ and to any bail or the sureties to any bond that he is authorized or required by law to take or approve.¹²

¹ 4 R. S. 126, § 3.

² 3 R. S. 725, § 12.

³ Laws 1851, ch. 32, § 1.

⁴ Laws 1847, ch. 183, § 1.

⁵ 4 R. S. 593, §§ 1, 7.

⁶ Military Code, § 267.

⁷ 3 R. S. 367, § 24.

⁸ Allen 31.

⁹ 3 R. S. 476, § 47.

¹⁰ 3 R. S. 685, § 69.

¹¹ 3 R. S. 647, § 30.

¹² 3 R. S. 866, § 9.

CHAPTER V.

THEIR POWERS AND DUTIES IN SERVING PROCESS.^a

§ 28. Every sheriff or other officer, to whom any process shall be delivered for service, shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, when the same is required, or is necessary; which return shall be signed by him. And for any violation of this duty, such sheriff or other officer, shall be liable to an action, at the suit of any party aggrieved, for the damages sustained by him, in addition to any other fine, punishment or proceeding which may be authorized by law.¹ In the service of process the sheriff is responsible only for unreasonable neglect in executing it. He is not bound to start on the instant of receiving it to execute it, without regard to everything else.²

§ 29. When process of any description shall be delivered to a sheriff to be executed, he must give to the person delivering the same, if required by him, and on the payment of the fee allowed by law, a note in writing, signed by such sheriff, specifying the names of the parties in such process, the general nature thereof, and the day of receiving the same.³ And he and every other officer serving process, shall, upon the request of the party served, and without charging or receiving any compensation therefor, deliver to such party a copy thereof.⁴ And any officer or other person, refusing to deliver a copy of any order, warrant, process or other authority, by which he shall detain any person, to any one who shall demand such copy and tender the fees therefor, shall forfeit two hundred dollars to the person so detained.⁵

§ 30. If any sheriff, or other officer, or any person pretending to be an officer, shall, under the pretence or color of any process or other legal authority, arrest any person, or detain him against his will, or seize or levy upon any property, or dispossess any one of any lands or tenements without due and legal process, or other lawful authority therefor, he shall upon conviction, be adjudged guilty of a misdemeanor,⁶ and shall be punished by imprisonment in a county jail not

¹ 3 R. S. 739, § 98; Code § 419; 6 Hill 550, *Pardee v. Robertson*.

² 13 Cal. 335, *Whitney v. Butterfield*.

³ 3 R. S. 739, § 96.

⁴ 3 R. S. 739, § 97.

⁵ 3 R. S. 892, § 88.

⁶ 3 R. S. 973, § 11.

^a Ia.—Rev. 1860, p. 775.

Ill.—1 St. 390, 398.

Mass.—St. 1860, p. 150.

Miss.—Rev. Code 123, 292, 489.

Neb.—R. S. 376.

Wis.—R. S. 1858, pp. 162, 641, 649, 835

exceeding one year, or by fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment ;¹ and the court may sentence such person to imprisonment in a solitary cell in such jail, if any such be erected ; but such imprisonment shall not exceed thirty days in the whole.²

§ 31. Process may be served, and an arrest may be made, in a criminal or civil cause, action or proceeding at any time during the day or night.³ No search warrant however, can be executed at night, but it must be executed in the day time ; that is, between sunrise and sunset, unless the warrant expressly authorize the execution of the same during the night time, which it may do in the case of stolen or embezzled property.⁴ In South Carolina it has been held that the sheriff must not make a levy at midnight, or improper hours, or he will be considered a trespasser, unless under very special circumstances.⁵

§ 32. An arrest may be made upon any day, including Sunday, in case of breach of the peace, or apprehended breach of the peace, or for the apprehension of persons charged with crimes and misdemeanors ; or in case of a violation of the statutes of this state for enforcing the observance of the Sabbath, or for the disturbance of religious meetings,⁶ or in an action for a penalty for a violation of the laws of the state in regard to the manufacture of salt ;⁷ and in such other cases as shall be specially authorized by law.⁸ One may be arrested on Sunday on an attachment for a rescue, or for a constructive breach of the peace.⁹ And so an attachment for a criminal contempt may be executed on Sunday.¹⁰ And any prisoner, in the custody of an officer, in jail or on the limits, who shall escape, may be retaken on Sunday, as well as any other day, whether the original arrest was in a civil or criminal case.¹¹

§ 33. But no writ, process, warrant, order, judgment or decree, or other proceeding of any court or officer of justice, except in the cases enumerated in the preceding section, shall be served or executed on Sunday, (which in this state is understood to include the whole natural day) and the service of any such process or proceeding in any other case, on Sunday, will be utterly void, and will subject the officer executing the same, to damages at the suit of the party aggrieved.¹²

¹ 3 R. S. 980, § 55.

² 3 R. S. 980, § 56.

³ 9 Coke 66, Mackally's case; Allen 118.

⁴ 3 R. S. 1041, § 34.

⁵ 1 Bay (S. C.) 358, State v. Thockam.

⁶ 2 R. S. 935, § 65.

⁷ 1 R. S. 680, § 237.

⁸ 2 R. S. 325, § 65.

⁹ Allen 101.

¹⁰ Sewell, 117.

¹¹ Graham's Pr. 149 ; Sewell 117, 119.

¹² 2 R. S. 935, § 65 ; 12 John. 178, Van Vechten v. Paddock ; 15 John. 177, Butler v. Kelsey ; 20 John. 140, Field v. Park.

Though a writ, *tested* or *returnable* on Sunday, is not *void* but *voidable* only,¹ yet when returnable on Sunday, it cannot be executed on that day, but must be executed at the latest on Saturday; and a return even of the process on Sunday will be bad.² And when the return day of the writ was Sunday, and an arrest was made on Monday morning, and the defendant held until the writ was renewed, the arrest was declared to be illegal.³ And if one is arrested on Sunday on criminal process, and is detained until Monday, and then arrested on civil process, the arrest will be void and the prisoner be discharged.⁴ A warrant for the arrest of the putative father of a bastard, is not such criminal process as will authorize its service on Sunday; and so of a warrant for the violation of a city ordinance.⁵ Nor can one be arrested on Sunday, for the non-payment of a penalty upon a conviction under a penal statute, except in the cases provided by law: nor on an attachment for the non-payment of an award, or for the non-payment of costs. And if in attempting to make an arrest on Sunday, in a case not authorized by law, the officer be killed, it would seem that such killing would not be murder.⁶ But though one cannot be arrested on civil process on Sunday, in the first instance, yet if the defendant escape after a proper arrest, he may be retaken on Sunday by his bail, or by any person thereto duly authorized by them, or by the officer from whom he escaped.⁷

§ 34. Whenever an election shall be held in any city or town, or town meeting, pursuant to the laws of this state, for other than militia officers, no declaration by which a suit shall be commenced, or any civil process, or proceeding in the nature of civil process, shall be served on any elector entitled to vote in such city or town on the day of such election or town meeting.⁸ With these exceptions, process may be served in civil as well as criminal cases, on any day and at any time of the day or night.

§ 35. Though the sheriff is required to execute process, and make return according to the command thereof, yet he will be excused from so doing, where an injunction shall have issued to restrain the proceedings; or an order shall have been granted, by the court, or proper officer, for the like purpose; or where a writ of error is brought, if it be in a criminal case, or an appeal, if in a civil action or proceeding. In general, the sheriff is not bound to regard or notice any such injunction, order, writ of error or appeal, until it shall have been

¹ 22 Wend. 648, *Williams v. Hogeboom*.

² Sewell 119.

³ 2 H. Bl. 29, *Loveridge v. Plaistow*.

⁴ 8 Barn. & Cress. 768, *Wells v. Gurney*.

⁵ 14 Barb. 425, *Wood v. City of Brooklyn*.

⁶ Allen 101.

⁷ Gra. Pr. 149; Sewell 119.

⁸ 1 R. S. 418, § 3; 1 R. S. 819, § 22.

served upon him, but when an order to stay proceedings or an injunction duly granted, is served upon him, he is bound to obey its commands ; and when a writ of error or an appeal is brought and notice thereof, together with notice that the proper security has been filed, has been served upon him, it is his duty to suspend further proceedings until a decision is had upon such writ of error or appeal. The granting and service of an injunction or order, or the bringing a writ of error or appeal, and notice thereof, does not annul or undo anything that has been done by the sheriff, in the due execution of the process. If he has, before such service, arrested one, or seized his goods, he is not to release either, but is to retain the prisoner, or the property, as if no such stay had been granted. And when he has levied on, or attached property, and is stayed by an order, he may still go on and make his inventory, and take possession of the property, but he cannot sell until the order or injunction is vacated or dissolved.

§ 36. The duties and liabilities of the sheriff, upon the service of process, are in many cases quite onerous. Thus, though he will be excused if he is unable to arrest one on mesne process ; or if, after arrest, and before he is committed to jail, he escape or rescue himself, or is rescued by others ; or if, after a levy, goods are rescued ; yet if a defendant in a civil action escape through his negligence, whether he be arrested on mesne or on final process ; or if he escape from jail, or is rescued after he is committed to jail, whether on mesne or final process, unless by reason of fire in the jail, the act of God, or of the public and foreign enemies, he will be liable therefor. But ample authority is conferred upon him to execute all such process, and to retain one arrested. Thus it is provided that whenever a sheriff or other public officer, authorized to execute any process delivered to him, shall find, or shall have reason to apprehend, that resistance will be made to the execution of such process, he shall be authorized to command every male inhabitant of his county, or as many as he shall think proper, and with such arms as he shall direct, and also to call for aid from any division, brigade, regiment, battalion or company of the military force of the state.¹ It is also provided that the officer so resisted shall certify to the court from which such process issued, the names of the resisters, their aiders and abettors, to the end that they may be proceeded against for contempt of such court.² Every person who shall resist, or enter into combination with any person or persons, to resist the execution of process, shall be guilty of a misdemeanor, and be punished by imprisonment in the county

¹ 3 R. S. 740, § 101 ; 4 Id. 97, § 291 ;
10 John. 85, *Coyle v. Hurtin* ; Military Code 1870, §§ 242, &c.

² 3 R. S. 740, § 102.

jail for a term not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court.¹ The officer should not raise the power of the county until resistance is first shown ; but when he does, he is the judge of the requisite force. Every person commanded by the sheriff or other officer, to assist him in the execution of process as aforesaid, who shall refuse, or without lawful cause, neglect to obey such command, shall be deemed guilty of a misdemeanor and subject to fine and imprisonment.² Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and to all who come to his aid ; but if his authority is not sufficient to justify him, neither can it justify those who aid him, for he has no power to command others to do an unlawful act, and they are only bound to obey when his commands are lawful. And there is no distinction between aiding in the original act, which was itself unlawful, and in aiding the officer in overcoming resistance to such unlawful act. Thus where an officer under an execution against one party, attempts to seize the property of another, who resists the seizure, and a bystander is commanded by the officer to come to his assistance, such bystander will be liable to the owner for any injury he may do to his person or property. But if a stranger comes to the aid of the officer in executing legal process, though the officer by reason of some subsequent improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser.³

§ 37. In case it shall appear to the governor, that the power of any county will not be sufficient to enable the sheriff thereof to execute process delivered to him, he shall, on the application of such sheriff, order such military force from any other county or counties of this state, as shall be necessary.⁴ And whenever the governor shall be satisfied that the execution of civil or criminal process has been forcibly resisted in any county or counties of the state, by bodies of men, or that combinations to resist the execution of such process by force, exist in any such county or counties, and that the power of such county or counties has been exerted, and is not sufficient to enable the officer having such process to execute the same, he may, on the application of such officer, or of the district attorney, or county judge, by proclamation to be published in the state paper and in such other papers as he shall direct, declare such county or counties to be in a state of insurrection, and may order into the service of the state such

¹ 1 R. S. 750, § 87.

² 3 R. S. 740, § 103.

³ 10 Wend. 128, *Elder v. Morrison* ;

13 Mass. 520, *Oystead v. Shed* ; 6 Mod. 140, *Leonard v. Stacey*.

⁴ 3 R. S. 740, § 104.

number and description of volunteer or uniform companies or other militia of this state as he shall deem necessary, to serve for such term as he shall direct, and under the command of such officer or officers as he shall think proper; and the governor may, when he shall think proper, revoke or declare that such proclamation shall cease at such time and in such manner as he shall direct. Any person who shall, after the publication of such proclamation, resist or assist in resisting, the execution of any process in any such county, so declared to be in a state of insurrection, or who shall aid or attempt the rescue or escape of any prisoner from lawful custody or confinement, or who shall resist, or aid, or assist in resisting any force ordered out by the governor to quell or suppress any such insurrection, shall upon conviction be adjudged guilty of a felony and punished by imprisonment in the state prison for a term not less than two years. The expense of such military companies so ordered out by the governor under such proclamation, shall be audited by the comptroller and paid by the treasurer.¹

§ 38. In case of any breach of the peace, tumult, riot or resistance to process of this state, or apprehension of imminent danger of the same, it shall be lawful for the sheriff of the county, or the mayor of any city, to call for aid upon the commandant of any division, brigade, regiment, battalion, troop, battery or company, and it shall be the duty of the commanding officer upon whom such order is made, to order out, in aid of the civil authorities, the military force or any part thereof, under his command. And the commanding officer of such force, when so called into service, shall provide the men of his command so ordered out, with a supply of proper ammunition and arms in complete order for actual service. And such officer shall be subject, as provided by law, to the sheriff or public officer who shall so require his aid; and for refusing or neglecting to obey the order of such sheriff or public officer, or for interfering, or in any way hindering or preventing the men of his command from performing such duty, or in any manner, by neglect or delay, preventing the due execution of law, such commanding officer, and every commissioned officer under his command so offending, shall be liable to a fine of not less than one hundred nor more than five hundred dollars, and imprisonment in the county jail not exceeding six months. And any non-commissioned officer, musician or private who shall refuse to obey his commanding officer in such case, shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars, and to imprisonment in the county jail not exceeding three months.²

¹ 1 R. S. 750, §§ 89, 90, 92

² Military Code 1870, §§ 242, &c.

CHAPTER VI.

OF THE RETURN OF PROCESS. ^a

§ 39. The sheriff must not only execute the process delivered to him for that purpose, but he must also make return of his doings thereunder, and for any violation of this requirement, he is liable to an action at the suit of any party aggrieved, for the damages sustained by him, in addition to any other fine, punishment or proceedings, which may be authorized by law. A "return" to process is the officer's answer touching the service or the execution of such process. It is usually in the form of a certificate, and is endorsed on the writ, process, or paper, and it must be signed by the officer making the return.¹ The sheriff may make "return" to any process or proceeding, whether the same was executed by himself in person, or by his deputy; or the return may be made by the deputy who rendered the service. The true course however will be for the party making the service to make the return to the process also. But if the deputy who made the service is dead, or has gone out of office, then the return must be made by the sheriff. When a deputy makes return to process of its execution by him, it must be made in the name of the sheriff, his principal; for a return by a deputy is no return and is void.² A sheriff or deputy may make return to process after the close of their term of office, of acts done by them when in office, or in the execution of process completed after the expiration of their term of office, if commenced before. In which case, they must sign the return as late sheriff and late deputy sheriff. But if such deputy has been removed from office, or has resigned, or otherwise vacated the office, he can do no farther act as deputy, whether it be before or after the close of the sheriff's term of office.³ In all cases where the process is *returnable* process, that is process to which the sheriff is authorized or required to make return of his doings thereunder, his certificate of what he has done in the execution thereof, is sufficient, except on the service of a citation from a surrogate's court to take proof of a will; ⁴ the return to a writ of *habeas corpus*, where the party is incapable of being brought

¹ 3 R. S. 739, § 98; Sewell 384.

² 2 Caines 61, Simonds v. Catlin; S. C. Col. & Cal. 35; Breese (Ill.) 163, Ryan v. Eards; 1 Scam. (Ill.) 127, Ditch v. Edwards, Err.; 23 Cal. 401, Rowley v. Howard; 1 Hay. (N. C.) 293, State v. Johnson. (But see as to Texas, 13 Tex. 497, Miller v. Al-

exander; Id. 507, Towns v. Harris; and as to Michigan, see 1 Mich. 344, Callender v. Olcott; and as to Vermont, see 4 Vt. 616, Eastman v. Curtis.)

³ 9 Wend. 258, Ferguson v. Lee; Ante §§ 15, 17.

⁴ 3 R. S. 148, § 55.

^a Ia.—Rev. 1860, p. 64.
Miss.—St. L. 297.

Wis.—R. S. 772, 784.

up by reason of sickness;¹ a return to a summons of the manner of service thereof upon a concealed defendant;² or of a precept for a jury for assessing damages on taking land for a plank road.³ In these cases, the return of the officer must be upon oath. Though the return should be endorsed upon the writ, or process, yet if such return be long, it may be made on a schedule and annexed to the writ; in which case it must be referred to by an endorsement upon the writ, as the return thereto.⁴ The return must be certain, and answer the whole writ.⁵ In general it should state how the service was made.⁶ An insufficient return is no return, and therefore the court will grant an attachment against one making an insufficient return,⁷ and so of an evasive return.⁸

§ 40. After the execution of the process, and after having properly endorsed his "return," the officer executing the same shall then return or deliver such writ, process or paper, to the proper officer, court or party, and until this is done the return is not complete,⁹ and if he fails to do so, he will be liable to the same penalties as in case of refusal or neglect to execute such process.¹⁰ The return is not complete until it is filed.¹¹ It is further provided by rule of the court, that any party entitled to have any such process or paper returned, may, at any time after the day when it is the duty of the sheriff or other officer to return, deliver or file any process, undertaking, order, or other paper, by the provisions of the code of procedure, serve on the officer a notice to return, deliver or file such process, undertaking, order or other paper, as the case may be, within ten days, or show cause, at a special term to be designated in said notice, why an attachment should not issue against him.¹² And on the return of any such attachment, the court may impose a fine upon the officer, or commit him to prison, or both, as the case may require.¹³ And although an action against the officer for not returning the writ may be barred by the statute of limitations, he may still be proceeded against by attachment, in order to compel a return.¹⁴ In such a case, however, the court did not impose a fine upon the officer, but discharged him on his returning the writ and paying the costs, as it

¹ 3 R. S. 889, § 65.

² Laws 1853, ch. 975, § 1.

³ 2 R. S. 496, § 82.

⁴ Watson 68.

⁵ Watson 69.

⁶ 1 Mo. 537, *Charles v. Marney*; 1 Scam. (Ill.) 175, *Wilson v. Greathouse*; 1 Scam. (Ill.) 177, *Clemson v. Hamm*.

⁷ Watson 70.

⁸ 10 John. 328, *In the matter of Samuel Stacy, Jr.*

⁹ 8 Mo. 417, *The State v. Melton*.

¹⁰ 3 R. S. 739, § 98; 6 Hill 552, *Pardee v. Robertson*.

¹¹ 19 Ill. 440, *Nelson v. Cook*.

¹² Rule 8 Sup. Ct.

¹³ 3 R. S. 852, § 20.

¹⁴ 4 Hill 71, *The People ex rel. Southwick v. Everest*.

appeared the writ was delivered to a deputy twelve years before, who had absconded and died abroad, and it did not appear what had become of such writ.¹ Process may be returned on the morning of the return day, although the defendant might have been arrested during the day, provided the officer had used due diligence.² Process cannot be returned on Sunday; nor should the return be dated on Sunday; and if the return day of the process is Sunday, it should be executed and returned the day previous.³

§ 41. If the process be in a criminal proceeding, the writ, warrant or attachment is to be returned by the officer, with his return endorsed, to the court or magistrate issuing the same, or to the officer before whom the party is taken for examination or trial.⁴ But if the person is arrested in a different county from that in which the warrant issued, and he is let to bail in such other county, the officer holding the warrant shall, after the magistrate so letting the prisoner to bail has endorsed his certificate thereof on such warrant, deliver the warrant and recognizance to the clerk of the court at which the prisoner is so recognized to appear.⁵ When an arrest is made under a bench warrant, and the defendant is not let to bail, the officer shall make return thereon of the arrest, and leave the same with the jailer into whose custody the prisoner is given; and so with a mittimus.

§ 42. In civil actions, process and papers are generally to be returned to the court, officer or attorney issuing them. When such process or paper expresses to whom, and when and where the same shall be returned, such direction should be followed, unless it conflicts with some statutory provision, or the rules and practice of the court. A summons and complaint, and injunction, with proof of service, are to be returned to the attorney. And so the order for the arrest of a defendant is to be returned to the attorney within the time fixed therein by the officer granting the same;⁶ but the affidavits on which the arrest is made, shall be filed by the sheriff, with the clerk of the county where the action is pending, within ten days after the arrest;⁷ and the undertaking, taken on the arrest, is to be filed with such clerk after the sureties have justified.⁸ Affidavits and proceedings under the code, for the return of personal property, are likewise to be filed with the clerk of the court in which the action is pending, within twenty days after the taking of the property.⁹ And the undertakings, given in such case, shall, after the justification of the sureties, be

¹ 5 John. 356, *Brockway v. Wilber*,
note *a*.

² 10 Wend. 367, *Hinman v. Borden*.

³ *Sewell* 119; *Ante* § 33.

⁴ 3 R. S., 994, § 12.

⁵ 3 R. S. 994, § 9.

⁶ *Code* § 183.

⁷ *Rule* 7 *Sup. Ct.*

⁸ *Code* § 423.

⁹ *Code* § 217.

delivered by the sheriff to the parties respectively for whose benefit they were taken.¹ All jury process must be returned to the court or officer before whom such jury is to appear. All subpoenas returnable before any court or officer, shall be delivered to the party, or his attorney, in whose behalf they were issued; and so of all citations issued by any surrogate. Executions issued by a county clerk upon a justice's judgment, docketed in his office, must be returned by the sheriff to the office where issued; and executions on judgments in courts of record, to the office of the clerk of the court where the judgment record is filed.² Executions on judgments of a District Court of New York city, or the Marine Court, where a transcript has been filed in New York, should be returnable to the clerk of New York Common Pleas. The sheriff, under sheriff and deputy sheriffs, may return all process in civil actions by mail, where the officer making such return resides in a different place from that in which the clerk's office to which the return is to be made is located, and between which places there is a regular communication by mail; but to render such return valid, the officer must enclose the process in an envelope, and properly direct it and deposit it in the post office nearest or most convenient to the said officer, and pay the postage thereon.³

§ 43. Until the process and return is actually filed in the proper office, the return is not complete, and is subject to the control of the officer executing the process, and may be amended by him according to the fact.⁴ And when the return has been so made and filed, the court will on proper application, allow an amendment by the officer.⁵ Filing the writ without an endorsement of what has been done is no return. But in such case the court has allowed it to be done, *nunc pro tunc*, on payment of costs.⁶ And so where a false return of *nulla bona* has been made, after a levy and a fraudulent removal of the property from the county by a third party, the court has, on application of the sheriff, ordered the return to be stricken out, and allowed him to withdraw the execution from the files in order that he might retake the property, or bring an action against the party who had eloiigned the same.⁷ The court will also authorize amendments on the application of parties or purchasers. A return may be amended although the sheriff has gone out of office; and if he is dead, the court will order it to be amended by the under sheriff.

¹ Code § 423.

² Code § 290.

³ 3 R. S. 739, § 99.

⁴ 8 Wend. 445, *Spoer v. Holland*; 13 Pick. 477, *Webb v. Joy*.

⁵ 36 Mo. 194, *Corby, &c. v. Burns*.

⁶ 19 How. 91, *Hale v. Ayer*; 23 Mo. 13 *Nelson v. Brown*.

⁷ 1 Kern. 270, *Barker v. Binninger*.

§ 44. The return of ministerial officer, upon returnable process, stating his official doings in the execution of such process, is conclusive between the parties to the suit, in the particular action in which such return is made.¹ It is conclusive evidence in the action, of the service of process therein.² Nor can the return of due service of process be impeached in an action by the defendant in the process, against the officer for false imprisonment; nor will it make any difference that the officer making the return served the process in his own case, where he might lawfully do so.³ And so a return of *non est inventus* is conclusive upon the surety in a bond given in a justice's court, that the defendant would render himself or pay the judgment.⁴

§ 45. In certain cases the return of the officer is but *prima facie* evidence of the matters it contains. It is so in actions between third parties, and where the matters returned, come collaterally in issue.⁵ In an action of trover or trespass by an officer for goods levied on by him, or for an injury thereto, his return is *prima facie* evidence of the levy and possession;⁶ and also to identify the property levied on. And if such return is not sufficiently explicit in this respect, he may amend it to conform to the fact.⁷ In an action by the sheriff, to recover the purchase price of land sold by him under execution, his return to the execution will be *prima facie* evidence that the defendant was the purchaser.⁸ So too, in an action for his fees for serving process, or the like, his return touching such service, will be *prima facie* evidence that the service was rendered.⁹ In actions against officers, their return is *prima facie* evidence for them, of acts done by them, under the process, which they are bound to perform.¹⁰ Thus a return that most of the money levied on, under an execution, had been applied in satisfaction of a previous lien, as for rent, will be *prima facie* evidence of that fact.¹¹ And so of a return to an execution of "satisfied, pursuant to the special direction of the plaintiff." In this case, the plaintiff was permitted to show that such return, in respect to such direction by him, was false.¹² A return to

¹ Watson 72; Allen 57; 3 Wend. 202, Putnam v. Man; 10 Wend. 300, Allen v. Martin; Id. 525, Boomer v. Laine; 10 Me. 263, Stimson v. Snow; 6 O. R. 135, Hill v. Kling.

² 8 How. 353, The Col. Ins. Co. v. Force; 7 Wend. 398, Case v. Redfield.

³ 3 Wend. 202, Putman v. Man.

⁴ 10 Wend. 525, Boomer v. Laine.

⁵ 23 Wend. 289, Baker v. McDuffie; 11 Barb. 541, Russell v. Gray; 14 Barb. 15, Henderson v. Cairns.

⁶ 7 Cow. 310, Cornell v. Cook; 8 Wend. 445, Spoor v. Holland; 16 Wend. 562, Earl v. Camp.

⁷ 8 Wend. 445, Spoor v. Holland.

⁸ 7 S. & Rawle, 369, Hyskill v. Givin.

⁹ Cow. & Hill's notes 1693.

¹⁰ 5 Den. 586, Browning v. Hanford; 22 Ill. 161; Owens v. Ranstead.

¹¹ 12 John. 378, Griffith v. Ketchum.

¹² 5 Wend. 207, Townsend v. Olin.

an execution of "satisfied" in part, is but *prima facie* evidence between the parties; and the plaintiff may contradict such return when he seeks to set off his judgment. And a return of satisfaction, not made by the sheriff in the course of his official duty, but in violation thereof, will not estop the plaintiff; as where the deputy takes a note, instead of the money, and receives it as payment, and returns satisfaction.¹ A return of any official act, under the process, which would be a legal excuse to the officer for not making complete service, or return, will be *prima facie* evidence of such fact, in favor of the officer. So of a return of rescue from arrest on *mesne* process before commitment to jail; or from the jail, where a party escapes or is rescued in consequence of a fire, or the act of God, or of the public enemies; or that goods and chattels sought to be levied on were rescued. And so too, if the writ was not received in time to be served before the return day, or that the defendant was too sick to be removed. In actions against an officer for a false return, such return is but *prima facie* evidence of the fact stated, and may be contradicted, even by the sheriff himself, as where he brings an action against his deputy for money which he has been compelled to pay by reason of such deputy's neglect of duty.²

§ 46. The sheriff will not be permitted to contradict the truth of his return,³ whether, it was made by himself or his deputy, unless, as has been said, it be in an action brought by him against his deputy, or his sureties for neglect of duty;⁴ or where he has attached property and inventoried it as the debtor's, he will be permitted to show, notwithstanding such return, that it did not belong to the debtor.⁵ In other cases he will be concluded by his return. Thus, where he returns an execution "satisfied," it will be conclusive upon him that he has received the money.⁶ And so his return has been held conclusive upon his surety in an action upon his official bond;⁷ and his endorsement on an execution of the time of its receipt, is deemed conclusive evidence that it was in his hands at the date.⁸ But he is only so concluded by his return when it is set up by a party who may claim something under it. If others rely upon it as his admission, it

¹ 1 Cow. 46, Bank of Orango Co. v. Wakeman; 4 Cow. 533, Mumford v. Armstrong; 6 Cow. 465, Armstrong v. Garrow.

² Cow. & Hill's notes 1086.

³ 20 Ind. 169, Butler v. The State; 6 Wis. 214, Vilas v. Reynolds; 3 S & M. (Miss.) 409, Planter's Bank v. Walker; 3 Conn. 528, Benjamin v. Hathaway.

⁴ 3 Seld. 453, Sheldon v. Payne; 5 Wend.

207, Townsend v. Olin; Cow. & H's notes 1087.

⁵ 4 Mass. 498, Fuller v. Holden; 13 Mass. 224, Leonard v. Bryant; 2 N. H. 83, Whiting v. Bradley.

⁶ 5 Wend. 207, Townsend v. Olin; 6 Cow. 465, Armstrong v. Garrow; 3 Seld. 453, Sheldon v. Payne.

⁷ Cow. & H's notes 1085.

⁸ 1 Hall 579, Williams v. Lowndes.

is but *prima facie* evidence and may be explained.¹ When such return is used as evidence against him, the whole return, so far as the same is a legal and proper return, must be taken together.²

§ 47. But if the process be not *returnable* process, that is where the officer is neither required nor authorized to make return of his doings thereunder; no return to any such process will be received, either for the officer or for or against any party to the process. And so where the process is *returnable* process, if the officer make return of the performance of acts beyond his duty under such process, such return will be invalid as to such parts, and will not be evidence; though the addition of such parts will not render the whole return void, but it will be good to the extent he was authorized to make return. Though such return will be invalid as to others, it may be used as an admission as against the sheriff in a proper case. Thus, the sheriff cannot make his return evidence that he has paid money, levied under an execution, to the plaintiff, yet such return may be used against him in an action for not paying over the money.³ Nor can the officer's return be evidence of any fact which would go to excuse him for not having performed his duty, except as has been seen, such facts be official acts done in the ordinary and usual course of proceedings under such process. Thus a return to an execution that goods levied on had been casually destroyed by fire after the levy, will not be competent evidence for the sheriff in an action against him for not collecting the moneys on such execution.⁴ When such fact is a good defence, as it will be, where the sheriff has taken the property into his possession, and it is destroyed by fire, or is otherwise lost, without fault on his part, it must be proved in the usual mode. And so a return of *rescue*, in the cases where such fact will not excuse the officer, as where the prisoner was under arrest on final process, or was rescued or escaped after being committed to jail, not in consequence of a fire, the act of God, or of the public enemies, it will not be evidence for the officer. And so of a return of sickness, as an excuse for not discharging his duty; or that he had lost the process, or the like, and therefore could not return it. These facts cannot be evidenced by the return, for there is no law authorizing such return. They likewise must be proved in the ordinary way. And so an officer's return will not be evidence of any act done by him without his county, except in the cases where he is authorized to act without his county.⁵ Still, if the sheriff has an excuse for not executing or returning process, he should so state it in his return, whether it will be legal evidence for him or not.

¹ 23 Wend. 289, *Baker v. McDuffie*.

² Cow. & Hill's notes 228.

³ Cow. & Hill's notes 1083; Allen 203.

⁴ 5 Den. 586, *Browning v. Hanford*.

⁵ Cow. and Hill's notes, 1034.

CHAPTER VII.

THEIR DUTIES AS PEACE OFFICERS, AND ON ARRESTS FOR CRIME. ^a

1. WHEN THEY MAY ACT WITHOUT WARRANT.

§ 48. Sheriffs are, *ex officio*, conservators of the peace within their respective counties;¹ and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to suppress every unlawful assembly, affray or riot which may happen in their presence.² If there be any affray in a dwelling house, the officer may break the door to preserve the peace. And if a breach of the peace, or any other crime or misdemeanor, is committed in their presence, (unless it be a misdemeanor unattended with violence, as perjury or libel, when a warrant will be necessary,) such officers may arrest the offender, without warrant, and take him before a magistrate. If the offence be a breach of the peace, merely, the arrest should be made within a reasonable time after the affray. But it is otherwise if a felony be charged, for in such case the arrest may be made at any time, whether there has been time to obtain a warrant or not.³ And if one engaged in an affray, fly into a house, if the officer follows in fresh pursuit, he may break open the doors to arrest him. This, however, should only be done in aggravated cases, and where it is important that the guilty party should not escape. But an officer has no power to arrest one who has been engaged in an affray, out of his view, after the affray is over, without warrant, unless a felony has been committed, or is likely to be done. It is their duty to preserve the peace, and not to punish for a breach of it; and where a breach of the peace has been committed and is over, the officer should not arrest without a warrant from a proper magistrate. But if one menace another with death, and complaint is made forthwith to the officer, he may, in order to avoid the present danger, and prevent a probable felony, detain the person charged, until he can conveniently bring him before a magistrate.⁴ In suppressing affrays, unlawful

¹ 10 John. 85, *Coyles v. Hurtin*.² 4 Bl. Com. 292.³ 3 Ind. 479, *Vanderveer v. Mattocks*;2 Blackf. (Ind.) 127, *Patterson v. Kise*; 15 Ill. 441, *Main v. McCarty*.⁴ 1 Russ. on Cr. 600; 2 Hale's Cr. L. 88.^a Ala.—R. C. §§ 3956, 3977, 3985.

Ark.—Dig. 1858, p. 1031.

Cal.—Dig. 1860, p. 273.

Kan.—Gen. St. 1868, p. 278.

Me.—R. S. 490.

Mass.—St. 1866, p. 827.

Minn.—Rev. 1866, pp. 127, 440, 630.

Miss.—Rev. Code, pp. 126, 619, 629.

Mo.—Gen. St. 1865, pp. 156, 832.

Neb.—R. S. 376.

N. H.—Gen. St. 1867, pp. 479, 485.

N. C.—Rev. Code, 208, 227; Laws 1869, p. 430.

O.—2 R. S. 1397.

On.—Gen. L. 500.

Penn.—Dig. 1861, p. 248.

R. I.—R. S. 556.

Tenn.—Code 140.

Va.—Code 1849, p. 761.

Wis.—R. S. 1858, p. 162.

assemblages and riots, the officer is authorized to demand the assistance of all other persons, and if any refuse, they may be punished by fine and imprisonment.¹ In case of any breach of the peace, tumult, riot or resistance to process in this state, or apprehension of imminent danger of the same, it shall be lawful for the sheriff of any county, or the mayor of any city to call for aid from any brigade, regiment, battalion or company, and it shall be the duty of the commanding officer of such brigade, regiment, battalion or company to whom such order is given, to order out in aid of the civil authorities, the military force, or any part thereof under his command.² Whenever the mayor of any city, or the sheriff of any county, shall be notified by any party of any threat or attempt to destroy or injure such person's property by any mob or riot, it shall be the duty of such officer on the receipt of such notice, to take all legal means to protect the property attacked or threatened; and any such officer who shall refuse or neglect to perform such duty shall be liable to the party aggrieved for such damages as said party may have sustained by reason thereof, provided such party shall elect to bring his action against such officer, instead of the city or county. But every such action must be brought within three months after the loss or injury.³

§ 49. Where a felony is committed *in view*, that is, in the presence of any one, every person so present, whether he be a peace officer, or a private citizen, is required to apprehend the offender.⁴ And if a felony has been committed, any person, whether he was present or not, may arrest the guilty party, without warrant at any time, whether there was sufficient time to obtain a warrant or not.⁵ Even probable suspicion of who the offender is will justify the arrest by an officer. And so, too, probable suspicion will be a justification, even if it should turn out that no felony had, in fact, been committed, provided the officer had reasonable grounds to suspect the party apprehended.⁶ And if one charge another with a felony, and desire a peace officer to take him into custody, such charge will justify the officer, though no felony has been committed. In such case, the party making the charge and not the officer, will be liable for its consequences, if it be false.⁷ The officer should not, however, receive every idle rumor, but should make such diligent inquiry touching the truth of the charge, as the

¹ 1 Russ. on Cr. 285, 286, 294.

² Military Code of 1870, § 242; Ante § 38.

³ 3 R. S. 875, § 3.

⁴ 11 John. 486, Phillips v. Trull.

⁵ 3 Wend. 253, Farrell v. Warren; 40 N. Y. 46, Burns v. Erben; 36 Me. 317, Burke v. Bell; 12 Cush. 615,

Commonwealth v. McLaughlin; 2 Root 171, Wexford v. Smith; 1 Root 66, Kent. v. Gay; 6 Hump. (Tenn.) 53, Eames v. The State.

⁶ Barb. Ct. L. 513.

⁷ 3 Wend. 350, Holley v. Mix.

circumstances will admit, before he assumes to arrest one upon the information of another. Where persons are found going about at night under suspicious circumstances, and where there is reasonable ground to suspect the commission of a felony, an officer will be justified in arresting them, on his own suspicion and detaining them until morning for examination. If there is reasonable and probable cause for the arrest, and it is not merely causeless suspicion, the officer will be excused though no felony has been committed.¹

§ 50. A prisoner confined in a county jail, or in a state prison, upon conviction for any criminal offense, who shall escape therefrom, may be retaken at any time without a warrant, and imprisoned again until tried for such escape, or until he be discharged on failure to prosecute therefor.²

§ 51. The sheriff and other officers resisted in the execution of process, whether civil or criminal, must arrest such resisters, their aiders and abettors, and carry them before a justice of the peace.³

§ 52. A justice of the peace may apprehend, or cause to be apprehended, by an officer, by word only, any person committing a felony, or breach of the peace in his presence.⁴ In suppressing riots, he may order the offender into custody of an officer for safe keeping, until he can be tried.⁵

§ 53. In all cases, other than those enumerated, and in the case of vagrants, disguised persons, and disturbers of religious meetings, to be hereafter noticed, a warrant will be necessary to authorize the arrest of one charged with any offence other than those enumerated in the preceding section, or in the special cases referred to. But in general, where one is liable to be detained upon a criminal charge, the court will not inquire into the manner of his capture; whether it was under a warrant or without it; whether the process was duly issued or otherwise, or whether it was void or irregular, or whether the arrest was made within or without the limits of the state, or whether by one authorized to arrest or not.⁶ In all these respects, there may be irregularities, yet if there be sufficient ground to charge the prisoner with the offence, the court will hold him to answer thereto,⁷ and leave the accused to his remedy against the person or officer who has acted under void process, or who has exceeded his powers, for trespass or false imprisonment. And if the prisoner, or others, resist an arrest under such circumstances, it will be justifiable; and if the

¹ 2 Hale C. L. 80; 1 East P. C. 303;
3 Taunt. 14, *Lawrence v. Hedger*.

² 3 R. S. 965, § 23.

³ 10 John. 85, *Coyle v. Hurtin*; 3 Wend.
384, *Taylor v. Strong*; 3 R. S. 740,
§ 101.

⁴ 4 Bl. Com. 292.

⁵ Barb. Cr. L. 496.

⁶ 9 Barn. & Cr. 446, *ex parte Susannah Scott*.

⁷ Allen 118.

officer in the execution of such void process is killed, it will not be murder, but manslaughter only,¹ unless the party interfering wantonly strike with destructive weapons, from which malice may be fairly presumed, when it will be murder.² And if, in attempting to execute void process, or executing process, void or irregular, in an irregular and improper manner, the officer kills the prisoner in endeavoring to arrest him, the warrant will afford him no protection. It is of the highest importance therefore to the officer, not only that the process under which he acts is legal process, but that he executes it in a proper and legal manner.

2. OF THE WARRANT OF ARREST. ^a

§ 54. Warrants in criminal cases, may be issued as follows :

1. A warrant for the arrest of one charged with any offence, or to compel one to give sureties, to keep the peace;³ to search for stolen goods;⁴ and for the arrest of a fugitive from justice from another state or territory,⁵ may be issued by a justice of the supreme court, judges of the superior court of law of the city and county of New York;⁶ judges of the county courts, and special county judges, mayors, recorders and aldermen of cities; the justices of the justice's court, and police justices in said city of New York; and justices of the peace and police justices appointed for any city, or elected in any town, and by no other magistrate.⁷ But a justice of the peace has no power to issue a warrant for the arrest of one charged with having committed a crime in another county, unless the offender be, at the time, in the county where the justice resides. If however, the offence was committed in the county where the justice resides, he may issue process of arrest, though the defendant, at the time, be in another county.⁸ In most of the cities and large villages, special provision is made for the arrest and examination of persons charged with crime within the limits of such corporations, and generally, all inferior magistrates therein are prohibited from taking cognizance of criminal complaints. But during the absence of such police magis-

¹ Allen 120.

² Allen 124.

³ 3 R. S. 991, § 1.

⁴ 3 R. S. 1040, § 82.

⁵ 3 R. S. 998, § 41.

⁶ 1 Sandf. 701, Matter of Heyward.

⁷ 3 R. S. 993, § 1.

⁸ 5 Hill, 164, The People v. Cassels.

^a Ala.—R. C. 395, 3977, 3985.

Cal.—Dig. 1860, p. 278.

Fa.—Dig. 1847, p. 519.

Ind.—2 R. S. 1852, 364.

Ill.—1 St. 415.

Ia.—Rev. 1860, p. 781.

Kan.—Gen. St. 1868, pp. 826, 841, 879.

Minn.—Rev. 1866, p. 630.

Miss.—Rev. Code pp. 627, 629..

N. H.—Gen. St. 1867, p. 479.

N. C.—Laws 1869, pp. 429, 432, 437.

O.—2 R. S. 1402.

On.—Gen. Laws, 500.

Penn.—Dig. 1861, 248.

Tenn.—Code, p. 895.

Va.—Code 1849, p. 761.

trates, or during a vacancy in such office, justices of the peace of such towns may issue process of arrest ; but in all such cases it must be made returnable before such police officer or court.

2. Whenever any coroner shall hold an inquest, and the jury shall find that any murder, manslaughter or assault has been committed, if the person charged with such offence be not in custody, such coroner shall have power to issue process for his apprehension in the same manner as justices of the peace.¹

3. The governor may issue a warrant for the arrest of a fugitive from justice from another state or territory found here, upon the requisition of the governor or chief magistrate of the state or territory from which such fugitive fled, under the provisions of the constitution of the United States and of the act of congress, concerning the delivering up of fugitives from justice.

4. Bench warrants for the apprehension of any one against whom an indictment shall have been found, may be issued by the court in which such indictment may have been presented, or by any justice of the supreme court, or judge of the county court of the county in which such indictment shall be found, either in vacation, or during the sitting of any such court ; and by the district attorney of the county in which the indictment was found.²

§ 55. The warrant for the arrest of one charged with crime, should show in what county it is issued, and the time when issued. It may be in the name of the magistrate who issued the same, or of the people. It must be under the hand of the magistrate, but it need not be under seal.³ It must be against some particular person or persons ; for if it be general, as to apprehend all persons suspected of being guilty of a particular crime, without naming or describing any individual, it will be void for uncertainty. If known, the name of the party should be accurately stated, and it must not be left in blank. If the name stated in the warrant be not the right one, or if it be erroneous in the christian name only, or if it be fictitious merely, an arrest under it cannot be justified, even though the person arrested be the one intended. Thus, where the warrant was issued against one whose name was unknown, but who was named in the warrant "John Doe, the person carrying off the cannon," it was held that it did not authorize the arrest of Levi Mead, though he was the person intended, and was, when the warrant was issued, actually engaged in carrying off a cannon. And so where the christian name of the party is erroneously inserted in the process, as

¹ 3 R. S. 1037, § 6.

² 3 R. S. 1020, § 57.

³ 3 R. 993, § 3.

Emeline, when it should be Evelina; or Samuel, when it should be Daniel, though the officer should, under such warrant, arrest the true party, he will be a trespasser.¹ Where a warrant recited a complaint against John R. Miller and commanded the officer to arrest the said "William Miller," it was held that the warrant was no justification for arresting John R. Miller, though the person intended.² If, however, the party is known as well by the one name as by the other, it will be sufficient if either is in the warrant, though it be not the right one. If the name is unknown, the warrant should contain the best description of the party that the nature of the case will admit. The warrant must recite the accusation.³ Enough should appear upon its face to inform the accused of the specific offence of which he is accused, and the place where it was committed. But the warrant need not contain the facts on which the charge is predicated. It will be sufficient in this respect, if the nature of the offence be clearly specified.⁴ A warrant for feloniously taking personal property should state its value, and the place from whence taken. But if it state a distinct charge of larceny, the omission of the value of the property will not render it invalid, but it will be deemed to be petit larceny only.⁵ On a warrant of arrest for larceny, the officer may take the stolen property if he can find it.⁶ In a mittimus, where a brief recital of an offence is required, the omission does not render it void, so as to subject the jailer or the officer to an action for false imprisonment, or excuse either for allowing an escape.⁷ The warrant must not be left in blank, to be filled up by the officer. And if the name of the officer or party be inserted without authority, after it is issued, the warrant will be illegal, and the officer making an arrest under it, will be a trespasser. The warrant is made returnable before the officer issuing the same. But if it be issued by a magistrate residing out of the town or city where the offence shall have been committed, and such charge be one which may be finally disposed of by a justice, it shall authorize the officer executing the same, to carry the accused before a magistrate resident and being in the town or city where such offence shall have been committed.⁸

§ 56. The warrant must at least, appear *regular upon its face*. That is, it must contain sufficient upon its face to show that an offence has been committed, and the nature thereof; that the magistrate

¹ 6 Cow. 456, *Griswold v. Sedgewick*;
1 Wend. 126, *Griswold v. Sedgewick*;
3 Wend. 350, *Holley v. Mix*;
4 Wend. 555, *Scott v. Ely*; 9 Wend.
319, *Gurnsey v. Lovell*.

² 28 Barb. 630, *Miller v. Foley*.

³ 3 R. S. 993, § 3.

⁴ 1 Hill 377, *The People v. McLeod*;
49 Barb. 89, *Pratt v. Bogardus*.

⁵ 2 Hill 281, *Howell v. The People*; 5
Barb. 465, *Payne v. Barnes*.

⁶ 47 Barb. 388, *Houghton v. Bachman*.

⁷ 21 Wend. 552, *Stewart v. Hawley*.

⁸ 3 R. S. 994, § 12.

signing it had competent authority to issue warrants in similar cases, and that it contains no intimation, in any way, that there was a defect of jurisdiction of the magistrate who issued it, either as to place, subject matter, or as to the person of the accused. If it is defective in any of these respects, or if there is the absence of any fact necessary to give the magistrate jurisdiction, and it so appears on the face of the process, it will be absolutely void, and all who participate in the issuing or execution thereof, will be trespassers.¹ Thus, if the warrant is issued by a justice of the peace, and it should appear upon its face that the offence was not committed within his county, and that the accused was not then in his county, it would be void for want of jurisdiction in the justice, and the officer ought not to execute it, unless the offence be a felony, when he may justify an arrest without warrant. But if the subject matter be within the jurisdiction of the officer, though there is a want of jurisdiction as to the person or place, unless such want of jurisdiction appears by the process itself, it will be good.² And it is immaterial in such case, whether the court or officer be one of special and limited, or general jurisdiction; or whether the officer be one *de jure* or *de facto* only, if he holds by a claim of right.³ Nor is it material that the officer executing process, regular on its face, is aware that there was a want of jurisdiction in the officer who issued the warrant. He must be governed, and is protected by the process, and if it is regular upon its face, he cannot be affected by anything which he has heard or learned out of it, as going to impeach it.⁴ And if in truth, the process is void for any such latent cause, and the arrest thereunder is illegal, the party who procured the same to be issued, and not the party who executes it, will be liable therefor.⁵ If there be any defects in the process, if they do not render it absolutely void, but voidable only, and may be amended, its execution will not render the officer a trespasser whether such defects appear upon the face of the process or not. Nor will the fact that such process is voidable, excuse the officer for refusing to execute it.

§ 57. No person can execute a warrant in a criminal case, unless it is directed and delivered to him. But if it is directed to the sheriff of a particular county, he may execute it in person, or by his under

¹ 16 Barb. 303, Pratt v. Hill; 37 Me. 120, Gurney v. Tuffts; 41 Me. 419, Thurston v. Adams; 41 Me. 430 Vinton v. Weaver.

² 5 Wend. 170, Savacool v. Boughton; 6 Wend. 368, Lewis v. Palmer.

³ 5 Wend. 231, Wilcox v. Smith.

⁴ 5 Hill, 440, The People v. Warren; 24 Wend. 487, Webber v. Gay; 16 Wend. 514, Parker v. Walrod; 3 Barb. 17, Dominick v. Eacker.

⁵ 13 Wend. 46, Loder v. Phelps; 3 Cow. 206, Adkins v. Brewer.

sheriff or general deputy; or he, or his under sheriff, may depute another by writing to execute it. If it is directed to the coroner of the county, or to any constable or marshal of the county generally, any one of such officers of such county may execute it. But if it be directed to any constable or marshal of a particular town or city, no such officer, not residing in such town or city, can execute it. And if any officer not so authorized, executes it, he will be a trespasser. If directed and delivered to a coroner, (except when he discharges the duties of sheriff, when he may appoint deputies to assist him,) or to a constable or marshal, such officer must execute it in person, and not by deputy; but any other person may lawfully assist.

§ 58. The warrant should be executed forthwith, according to its commands,¹ but it continues in force during the term of office of the magistrate who granted it, and an arrest may be made under it, at any time, while it so continues in force.²

§ 59. The warrant, when in due form, or where its defects are only such as render it *voidable*, and not *void*, will protect the officer in the due and legal execution thereof; but not in any abuse of the person rights, or property of the accused. And where there is a regular warrant, and the officer has executed it in due manner, yet if he and the complainant combine to extort money from the prisoner, such officer will thereby lose the protection of such warrant, and be liable for false imprisonment.³ And where a justice directs the execution of process in any other manner than as prescribed by law, it will render both himself and the constable who obeys such direction, trespassers. Thus where a justice, by an endorsement upon a warrant, issued by him late on Saturday night, directed that the accused should be committed until the following Monday to await examination, instead of being brought immediately before him, and the constable, in pursuance thereof, arrested the accused on Saturday night and committed him to jail without first bringing him before the justice, both justice and constable were held to be trespassers.⁴

3. OF THE ARREST. ^a

§ 60. Certain persons are exempt from arrest, in civil actions, as foreign ministers, members of congress and of the legislature, females

¹ 3 R. S. 993, § 3.

³ 3 Wend. 350, *Holley v. Mix*.

² Barb. Cr. L. 531, 532; *Peake's N. P.* ⁴ 16 Barb. 303, *Pratt v. Hill*.

234, *Dickinson v. Brown*.

^a Ill.—2 St. 1127; 1 Id. 414.

N. H.—Gen. St. 1867, p. 481.

Ia.—Rev. 1860, p. 783.

O.—2 R. S. 1176.

Kan.—Gen. St. 1868, p. 841.

On.—Gen. L. 500, 503.

Mass.—St. 1860, p. 831.

Tenn.—Code p. 896.

Minn.—Rev. 1866, p. 630.

and others. But such exemption does not extend to criminal matters, and all persons, without distinction, who are charged with any crime or offence against the laws of this state, are liable to arrest.

§ 61. When the party against whom a warrant issues, has been guilty of a felony, the officer is not required to use the same circumspection in making the arrest as in the execution of a warrant against one charged with a minor offence; for, as has been seen, an arrest may be made in the former case without warrant. But where the offence charged is not a felony, and a warrant is necessary to authorize an arrest, in the particular case, the officer cannot be too cautious in its execution. If, in such case, as has been already stated, the warrant does not correctly name the party, or where his name is unknown, if it does not correctly describe him, by particular marks, so that he may be identified, the officer who executes such warrant will be a trespasser, though he actually arrests the proper person.¹ He must arrest the person named; or, if not named, the person corresponding with the description in the warrant, and none other. If the officer does not know the party, he should be informed so as to be acquainted with his personal appearance, or have some one on whom he can rely, point him out, as he is bound at his peril, to arrest the proper person.²

§ 62. The arrest may be made in any place, for no place affords protection to a criminal, not even the church or the churchyard.³ And the warrant may be executed in any part of the state by the officer or person to whom it is directed and delivered, whether it be in his own county or not. But when such warrant is issued by an assistant justice in New York, or an alderman or justice of the peace, it cannot be executed out of the county of which they are officers, unless it is endorsed with the name of a magistrate of the county in which the accused is supposed to be. And any magistrate of such county is authorized so to endorse the same on proof of the handwriting of the officer issuing the original warrant. Such proof may be by the oath of the person bringing such warrant to such justice for endorsement. When the warrant is so endorsed, the person bringing the warrant, or any other officer to whom it may have been directed, may arrest the offender in the county where the warrant was endorsed,⁴ in the same manner as if the warrant had been issued by an officer whose warrants run throughout the state.

§ 63. When a felony has been committed, even a private person, without warrant, may break open the outer door of any dwelling

¹ Ante, § 55.

² Barb. Cr. L. 532.

³ Cro. Jac. 556, *White v. Wiltshire*.

⁴ 3 R. S. 993, § 5.

house in which the felon may be, in order to arrest him.¹ And an officer may break open any such door when he has reasonable and probable cause of suspicion that a felony has been committed; or he may do so upon the information of another party in whose knowledge a reasonable suspicion thereof exists.² But before he acts upon the information of another, he should make diligent inquiry into the facts. If any officer or private person break into the house of a third person, without warrant, to arrest a felon, it will be at the risk of finding him there. But it is otherwise if the officer acts *bona fide* under a regular warrant.³ Where there is an actual affray in a house, within view or hearing of the officer, or where those who have made an affray in his presence, fly to a house and are pursued by him, he may break open the door to arrest the offenders or suppress the tumult.⁴ But the breaking of doors should be resorted to only in cases of extreme necessity; and in all cases, where the party does not know the object of the officer, there should first be a demand for admittance, and a statement of the object of it, and a refusal, whether there be a warrant or not.⁵ But where one breaks away from an arrest, and shuts himself up in a house, the officer, in attempting to retake him, may break the outer door without making known his business and demanding admittance, provided that the pursuit be fresh, and the party consequently aware of the object of the officer.⁶

§ 64. Where there is a warrant duly issued, and not void upon its face,⁷ doors may be broken open in the day or night, if the offender cannot otherwise be taken, in cases of treason, felony, suspicion of felony, or actual breach of the peace, or to search for stolen goods, if the search warrant authorize a search at night;⁸ to arrest one to compel him to find sureties for good behavior; or to arrest one on process for a criminal contempt.⁹ After indictment, a criminal of any degree, may be arrested in any place, for no house is a sanctuary to him.¹⁰ And the warrant will be a complete protection to the officer to whom it is directed, acting *bona fide* under it, even though the party accused should prove his innocence.¹¹ And if, in the attempt to execute a warrant, by breaking into the house of a felon, after demand for admittance, and refusal, the officer be killed by the party resisting, it

¹ 1 Hale Cr. L. 589; 2 Hale 92.

² 2 Hale's Cr. L. 92.

³ Barb. Cr. L. 548; Allen 126; 2 Hale Cr. L. 117.

⁴ Hale Cr. L. 589.

⁵ Allen 122; Barb. Cr. L. 545.

⁶ 10 Wend. 300, Allen v. Martin.

⁷ Ante, § 56.

⁸ Allen 123; 1 Hale Cr. L. 583; 2 Id. 117; 10 John. 263, Bell v. Clapp; 1 Root 134, (Conn.) State v. Shaw; 10 Cush. 501, (Mass.) Barnard v. Bartlett.

⁹ Barb. Cr. L. 546.

¹⁰ Barb. Cr. L. 548.

¹¹ Cro. Eliz. 130, Windham v. Clere.

will be murder in all concerned.¹ And if, on the other hand, he or those acting in his aid, unavoidably kill any of the parties opposing him, it will be justifiable homicide.² When the officer has entered a dwelling, and the doors are locked upon him, he may break them open to obtain his liberty. So he may break open a house to rescue his officer unlawfully detained within.³ When the officer is once in the house he may break open all inner doors, drawers, boxes and chests he may deem necessary in the execution of the warrant.⁴

§ 65. A regular officer, acting within his proper district, is not bound to exhibit his authority when he arrests an offender, though it be demanded; but a special deputy must do so in such case, and if he refuses, the party may resist;⁵ and the warrant, under such circumstances, will be no protection to such special deputy against an action for assault and battery and false imprisonment. But whoever makes the arrest, whether a regular officer, or a special deputy, the party arrested ought in some way to be notified of the officer's business, if he does not already know it.⁶ And the officer, upon request, and without fee, must deliver a copy of the process to the party, and a refusal to do so is made a misdemeanor in such officer.⁷

§ 66. No manual touching of the body of the accused is necessary to constitute an arrest. It is sufficient if he is in the power of the officer, and submits to the arrest. But the mere giving charge, or causing him voluntarily to appear before a magistrate, without taking him into actual custody, will not amount to an arrest.⁸

§ 67. The degree of force the officer is authorized to use in attempting to arrest a prisoner depends upon the offence charged. In case of felony, or where a dangerous wound is given, or the officer attempts to prevent a felony, whether with or without a warrant, if the party fly to avoid arrest, when about to be made, or break away after it has been made, and is killed or wounded by the officer in endeavoring to prevent his escape, and without which he could not be taken, it will be justifiable homicide.⁹ If he have no warrant he must show that a felony was actually committed to justify taking life.^{*} But in case of affrays, assaults, or other misdemeanor, where the party does not resist, but merely flies to avoid arrest, if the officer kill him in the pursuit, the law will not protect him. So even after arrest in such case, where the party effects his escape without vio-

¹ 4 Bl. Com. 292.

² 3 R. S. 939, § 2.

³ Barb. Cr. L. 547; Cro. Jac. 556, *White v. Wiltshire*.

⁴ 1 Hale Cr. L. 459.

⁵ 10 Wend. 514, *Arnold v. Steeves*; 42 Wend. 418, *Frost v. Thomas*.

⁶ 6 Barb. Cr. L. 534; *Watson* 58; 2 Hill 86, *Bellows v. Shannon*.

⁷ 3 R. S. 739, § 97.

⁸ Barb. Cr. L. 530, 1531.

⁹ 3 R. S. 939, § 2 Sub. 3.

¹⁰ 5 Parker 234, *Conraddy v. The People*.

lence, if the officer kill him in the pursuit, he will be guilty of manslaughter.¹ In the conveyance of a prisoner the officer should impose no more force or restraint than is necessary to prevent his escape; the nature and degree of which must depend upon the circumstances of the case; such as the state of the county, the magnitude of the offence, the age and character of the prisoner, or the probability of a rescue or escape. The officer should treat the prisoner with such kindness and humanity as may be consistent with his security, and will not be warranted in employing any harsh or unnecessary constraint, yet it is his duty to use such reasonable precaution as the case requires to prevent an escape; especially in arrests for felony, or offences of magnitude². And after the arrest it has been held the officer may ordinarily search the prisoner so far as to ascertain if he has any deadly weapons on his person or in his possession, and if such be found the officer may seize them and hold them, to be properly disposed of, if in such cause he believes such course necessary for the public safety or safe keeping of the prisoner.³

§ 68. Where one has been duly arrested by an officer, under civil process, and is in his custody, or is in jail, such person is in the custody of the law, and if he escape, or is wrongfully discharged, or improperly let to bail, it is the duty of the officer forthwith to retake him, wherever he may be found, whether it be in his own county, or in another county to which he may have fled. And on being rearrested he may be brought back to the county where he was so held. And it is immaterial whether the prisoner was suffered to go at large, or he escaped through the negligence of the officer or others. The distinction between voluntary and negligent escapes does not apply to criminal cases.⁴ And while the prisoner is in the custody of the law, he cannot be rearrested and taken out of the custody of the officer making the arrest, or of the jailer having him in charge, upon any other process whether in a civil or criminal case, except upon habeas corpus duly granted. When he is detained upon a criminal charge, the supreme court, or any justice thereof, may allow him to be arrested upon civil process; but such arrest is not to affect his arrest upon the criminal process, or release him therefrom.⁵ If the accused be under arrest, in jail or upon the limits, on civil process, the officer having a criminal warrant, must wait until he is discharged from such civil arrest, or complaint. If, in such case, the criminal warrant be such as may be executed by the officer having the prisoner in custody, it should be

¹ Barb. Cr. L. 539.

² 1 Barb. Cr. L. 537.

³ 47 N. H. 482, *Closson v. Morrison*.

⁴ 6 Hill 344, *Clark v. Cleveland*.

⁵ 10 Wend. 636, *Williams v. Bacon*.

left with him, and he may detain the prisoner thereunder, on the termination of his civil arrest; and he may do so without warrant, if the charge be for a felony. But if the officer having him in custody under such civil process, allow the officer having criminal process, to take him out of his custody, he will be liable for an escape.¹ And if he is so taken, the officer so holding him should retake him. If the party be in jail, on any other criminal charge and fully committed for trial, the magistrate to whom the second complaint is made, should hear it, and if it is sustained, he should send a warrant of detainer to the jailer. Such seems to be the English practice. If he has not been fully committed, he may be brought up and examined under the second complaint, but not so as to interfere with, or discharge him from the first arrest. Where one is arrested on a warrant for grand larceny, the officer has a right to take the property alleged to have been stolen before the magistrate, if the same is found on the person or in the possession of the accused.² But arresting one by aid of a policeman and searching his person for goods supposed to have been stolen is not justifiable.³

4. OF BRINGING THE PRISONER BEFORE THE MAGISTRATE.

§ 69. Where an arrest has been made without warrant, the officer may, of course, release the prisoner, if he is satisfied that the alleged offence has not been committed, or that the person so arrested, is not guilty of the charge. But if he holds him by virtue of a warrant, duly issued, he cannot release him of his own motion, whether he knows him to be innocent or not, but he must obey the command of such warrant. In all cases of arrest, whether such arrest be made with, or without warrant, the prisoner must be brought, without delay, before a proper magistrate for examination.⁴ And no magistrate issuing any such warrant, can authorize or direct the officer holding it, verbally or by writing on the warrant, to detain or commit the prisoner when he shall be arrested, until a future day for examination, without first having the prisoner brought before him. And if the officer obey any such direction, he and the justice will be trespassers.⁵ But if the arrest is made at night, or upon Sunday, the prisoner may be detained by the officer until the next day, and then be brought before the magistrate.

§ 70. If the arrest is made without warrant, the officer should take the prisoner, forthwith, before the nearest and most convenient justice

¹ 9 How. 93, *Brown v. Tracy*.

² 47 Barb. 388, *Houghton v. Bachman*.

³ 39 N. Y. 381, *Mali v. Lord*.

⁴ 4 B. & C. 281, *Knight v. Court*;

16 Barb. 303, *Pratt v. Hill*; 29 How. 185, *In the matter of Arthur Henry*.

⁵ 16 Barb. 303, *Pratt v. Hill*.

of the town or city where the offence was committed, if such offence be one which may be finally decided by a justice of the peace. But if the offence be one which a justice of the peace cannot finally decide, the prisoner may be taken before any justice of the county where the crime was committed. The officer, however, ought not, in any case, where he is authorized to take the prisoner before any magistrate of the county at large, to take him before one living remote, whereby the prisoner may be deprived of the aid of counsel, or embarrassed in procuring witnesses or bail.

§ 71. Where the arrest is made under a warrant, the officer making such arrest, must obey the command of such warrant, and bring the prisoner before the magistrate before whom the same is made returnable. Where the warrant is made returnable before a magistrate, other than the one who issued the same, as it is required to be in certain cases, if the former justice be absent, or his office be vacant at the time of making the arrest, then the officer making such arrest may bring the prisoner before the magistrate issuing such warrant. In such cases, however, the officer making the arrest, should first make return to the warrant, showing such absence or vacancy in the office of the magistrate before whom such warrant is made returnable.¹

§ 72. If the warrant be made returnable before the magistrate issuing it, the prisoner shall be brought before such magistrate. But if he is absent, or his office is vacant, then he shall be brought before the nearest magistrate in the same county; and the warrant by virtue of which the arrest shall have been made, with a proper return endorsed thereon, and signed by the officer making the arrest, shall be delivered to such magistrate.² In all such cases, where a prisoner is brought before a magistrate, other than the one before whom the warrant is made returnable, the officer's return to the warrant must show the absence, or vacancy in the office, of such latter magistrate.³

§ 73. When an arrest is made in a county different from that in which the warrant issued, and the offence charged be not punishable with death, or imprisonment in a state prison, if the person arrested require to be brought before a justice of the county in which he shall have been arrested, it shall be the duty of the officer making the arrest, to convey him before a magistrate of such county, who may take from the prisoner a recognizance, with sufficient sureties for his appearance at the next court, having cognizance of the offence in the county where the offence shall be alleged to have been committed. And such magistrate shall certify on the warrant, the fact of his letting

¹ 17 Wend. 211, *The People v. Tuttle*.

³ 17 Wend. 211, *The people v. Tuttle*.

² 3 R. S. 994, § 12.

the prisoner to bail, and shall deliver the same, with the recognizance, to the officer having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which such prisoner shall have been recognized to appear. If it be not a case where the prisoner can be let to bail by a magistrate in such county, or if such magistrate refuse to let him to bail, the officer making the arrest shall take the prisoner before a magistrate of the county where the warrant originally issued.¹

§ 74. If the offence of which the prisoner is charged, is punishable with death or imprisonment in a state prison, the officer making the arrest in a different county from that in which said warrant issued, shall carry the prisoner to the county where the warrant was originally issued, before some magistrate therein.² And no magistrate can let such prisoner to bail in the county where arrested, and if any such magistrate does let him to bail, the officer should not discharge him, and if he does discharge him, it will be an escape, and the officer will be bound to retake him. The distinction between *voluntary* and *negligent* escapes does not extend to criminal matters, and an officer may retake a prisoner whether he has permitted him to go at large improperly, or he has escaped without his knowledge or consent.³

§ 75. Where one is arrested upon a bench warrant, after indictment, he must be brought, forthwith, before the court where the warrant is returnable, or be delivered by the officer making the arrest to the proper jail of the county where the indictment was found. But if the court be not in session, and the prisoner desires to be let to bail, the officer shall first take him before some proper officer authorized to let to bail in the particular case. If the prisoner is arrested in a county other than that in which the indictment was found, the same proceedings shall be had as on an endorsed warrant before indictment.⁴ If the prisoner is in the jail of another county, upon the same charge, the sheriff thereof may deliver him up to the officer of the county where he is indicted, on the production of a bench warrant from the county where indicted.⁵

§ 76. Where an officer shall have arrested a prisoner on a criminal charge, in any county, he may convey him through such parts of any other county, or counties, as shall be in the ordinary route of travel from the place of arrest to the place where the prisoner is to be conveyed, and such conveyance shall not be deemed an escape. And

¹ 3 R. S. 994, §§ 7, 8, 9.

² 3 R. S. 994, § 11.

³ 6 Hill 344, *Clark v. Cleveland*.

⁴ Ante § 73; 3 R. S. 1020, § 58.

⁵ 9 Wend. 505, *The People v. Mason*.

while so passing through such other county, or counties, such officer shall not be liable to an arrest on civil process ; and he shall have the like power to require any citizen to aid him in securing such prisoner, and to retake him if he escape, as if he was in his own county, and a refusal, or neglect to render such aid, shall be an offence in the same manner as if he was an officer in the county where such aid shall be required.¹

§ 77. When the prisoner is brought before the proper magistrate for examination, it will be the duty of the officer making the arrest, to retain such prisoner in his custody, under the direction of such magistrate, until he is committed or discharged, or let to bail. Or, he may be committed to any safe place of custody, during any adjournment of the examination, verbally, or by warrant ; or to the county jail, from time to time, for future examination, by warrant of the magistrate. There is no limitation as to the time during which the officer may detain a prisoner, after bringing him before the justice, and before proceeding to the examination, as under a justice's warrant in civil cases.² The officer will have done his duty when he shall have brought the prisoner before the proper magistrate ; and if such magistrate delays, unnecessarily, the examination, he, and not the officer, will be responsible. But the officer should do nothing to delay or prevent a speedy examination, as he may thereby lose the protection of his warrant, and become liable for false imprisonment. Where the prisoner waives an examination, or the magistrate, after examination, decides to commit him to answer the charge, if the prisoner is ready to give bail, the officer must take him before some proper judge or officer authorized to take bail in the case, if the committing magistrate is not authorized so to do ; and on his giving bail in the amount, and with sureties satisfactory to the judge or officer, he is to be released, and the duties of the officer having him in charge, are at an end. If he does not give bail, the officer must forthwith deliver him to the custody of the jailer, at the jail of the county.

§ 78. Any magistrate who shall commit any person charged with any offence, to prison, or by whom any vagrant or disorderly person shall be committed, may cause such person to be searched for the purpose of discovering any property he may have ; and if any property be found, the same may be taken, and applied to the support of such person while in confinement.³

¹ 3 R. S. 1043, §§ 53, 54.

³ R. S. 1041, § 36.

² 3 R. S. 430, § 23 ; 10 Wend. 514, Arnold v. Steeves.

5. SEARCH WARRANTS. ^a

§ 79. The officers empowered to issue warrants for the arrest of persons charged with crime, are also authorized to issue warrants to search for stolen or embezzled goods.¹ Every such warrant shall be directed to the sheriff of the county, or to any constable of the town or city;² for it cannot be executed by a private citizen.³ It shall command the officer to search the place where such property is suspected to be concealed, in the day time, (or it may authorize such search to be made in the night time,⁴) and to bring such property before the magistrate issuing the warrant.⁵ The place to be searched must be particularly designated, and the property must be particularly described in such warrant.⁶ It has been held that it must be under the seal of the officer issuing it.⁷

§ 80. The officer to whom such warrant is directed and delivered for execution, should be careful that he does not search in any place not particularly described in the warrant. A warrant commanding a search in a dwelling house will not warrant a search in a barn.⁸ And if such warrant does not expressly authorize a search in the night, it must be done in the day time, between sunrise and sunset. The officer should also be careful that he does not seize any goods which do not correspond with the description in the warrant. But if he seizes goods which correspond with, and come within the description of those stolen, he will be justified in taking them, though they do not prove to be the goods lost by the complainant.⁹ And if the officer find other property in the place designated, which it is reasonable to believe was stolen also, or which may be necessary to convict the possessor of the stealing of the property searched for, he may seize such property. If admission to the premises described is refused, after a demand to enter, and notice of the officer's business, the outer door of the house designated may be broken open; and on refusal of the keys, all inner doors, boxes, chests and trunks, necessary to execute the warrant. If the goods are found in the posses-

¹ Ante, § 54.² 3 R. S. 1041, § 33.³ 3 R. S. 1041, § 35.⁴ 3 R. S. 1041, § 34.⁵ 3 R. S. 1041, § 33.⁶ 1 R. S. 376, § 11.⁷ 3 Park. Cr. R. 665, *The People v. Holcomb*.⁸ 41 Me. 254, *Jones v. Fletcher*.⁹ 5 Met. (Mass.) 98, *Stone v. Dana*.^a Ala.—R. C. § 4376.

Cal.—Dig. 1860, p. 34.

Ill.—1 St. 415.

Ia.—Rev. 1860, p. 482.

Mass.—St. 1860, p. 830.

Mich.—St. 1859, p. 1602.

Minn.—Rev. 1866, p. 635.

Miss.—Rev. Code p. 627.

N. H.—Gen. St. 1867, p. 483.

N. C.—Laws 1869, p. 445.

On.—Gen. Laws, 520.

R. I.—R. S., 551.

Tenn.—Code, p. 938.

Va.—Code 1849, p. 759.

sion of any one, and there is reason to believe that he is the person who stole them, it will be the duty of the officer to arrest such person, and to bring him before the magistrate, to be dealt with according to law. If the officer pursues strictly the direction of the warrant, he will not be responsible, though the goods are not found in the place directed to be searched; nor will it make any difference if the warrant is improperly granted, if it be regularly granted, and legal in form.²

§ 81. When property alleged to have been stolen, shall come into the custody of any constable, marshal, sheriff, or other person authorized to perform the duties of any such officer, he shall hold the same, subject to the order of the officers authorized to direct the disposing of it. Upon receiving satisfactory proof of the title of any owner of such property, the magistrate who shall take the examination of the person accused of stealing such property, may order the same to be delivered to such owner, on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate; which order shall entitle such owner to demand and receive such property. If stolen property shall not have been delivered to the owner thereof, the court before which a conviction shall be had for the stealing of such property may, upon proof of the ownership of any person, order the same to be restored to him. If stolen property shall not be claimed by the owner thereof before the expiration of six months from the time any person shall have been convicted of stealing such property, the magistrate, sheriff, constable, or other officer or person having the same in his custody, shall deliver such property to the county superintendents of the poor, on being paid the reasonable and necessary expenses incurred in the preservation thereof, to be appropriated to the use of the poor of such county.³

6. FUGITIVES FROM JUSTICE FROM OTHER STATES. ^a

§ 82. The constitution of the United States provides, that if a

¹ Barb. Cr. L. 501.

² 10 John. 263, *Bell v. Clapp*.

³ 3 R. S. 1041, §§ 37, 38, 39, 40.

^a Ala.—R. C., § 4348.
Ark.—Dig. 1858, p. 558.
Cal.—Dig. 1860, p. 323,
Va.—Dig. 1847, 529.
Ind.—Laws, 1867, p. 126.
Ill.—1 St. 496.
Ia.—Rev. 1860, p. 778.
Kan.—Gen. St. 1868, p. 507.
Ky.—1 R. S. 557.
La.—R. S. 171.
Mass.—St. 1860, p. 853.

Mich.—St. 1857, p. 1602.
Minn.—Rev. 1866, p. 626.
Miss.—Rev. Code, 631.
Mo.—Gen. L. 869.
Neb.—R. S. 654.
N. H.—Gen. St. 1867, p. 497.
N. J.—Dig. 1855, p. 184.
N. C.—Laws, 1869, p. 126
On.—Gen. L. 524.
R. I.—R. S. 567.
Tenn.—Code, p. 941.

person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, he shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.¹ And by act of congress, it is declared that whenever the executive authority of any state in the union, or of either of the territories, shall demand any person as a fugitive from justice, of the executive authority of any state or territory, to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested, and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged.²

§ 83. If an indictment has been found against any fugitive who has fled from justice from this state, before the governor thereof will issue his requisition upon the governor of the state or territory where such fugitive may be, for his arrest and delivery up, under the provisions of the act of congress aforesaid, there must be produced to him a true copy of such indictment, certified by the clerk of the county, where the same was found, under his hand and the seal of his office. Such certificate should be in the usual form where copies of records are so certified, and should state that the clerk had compared the copy of the indictment with the said original on file in his office, and that such copy was a true transcript therefrom, and of the whole of such original, and of all the endorsements thereon.

§ 84. If such fugitive has not been indicted, then there must, in like manner, be produced to the governor, an affidavit or affidavits, in due form of law, taken before some magistrate authorized by the laws of this state, to issue process for the apprehension of criminals,³ showing the commission of some act of treason, felony or other crime. If such affidavit was taken before a justice of the peace, or other inferior

¹ Cons. U. S. Art. 4, § 2.

³ Ante, § 54.

² Laws U. S., Feb. 12, 1793, § 1, 1 Sto. ry's ed. 284.

magistrate, then there should be annexed to it, the certificate of the clerk of the county, where such magistrate resides, in which he shall certify, under his hand and seal of office, that the person before whom such affidavit was taken, was, at the date thereof, such justice of the peace or other magistrate, in and for said county, and that the jurat to such affidavit is signed by such officer in his own proper handwriting.

§ 85. If on examination of such affidavit, or copy of indictment, the governor of this state shall be satisfied that a crime has been committed within the meaning of the constitution of the United States, and of the act of congress aforesaid, he shall certify, in writing, to the governor or chief magistrate of the state or territory where the fugitive may be, that such copy of indictment or affidavit is authentic, and is authenticated in accordance with the laws of this state. And he shall therein require that such fugitive be apprehended and delivered to any person he may designate in such requisition, specially authorized by him, to receive and convey such fugitive to this state to be dealt with according to law. Such certificate and requisition is usually sealed with the privy seal of the state, and signed by the governor and attested by the private secretary, and is then securely attached to the affidavit or copy of indictment, on which the same is granted.

§ 86. Such requisition and the proofs annexed, are then delivered by the governor to the person he has designated and empowered therein to receive and convey here such fugitive. The governor at the time of granting such requisition, also gives to such person a separate power and authority, in writing under his hand and the privy seal, and attested by the private secretary in the same manner as the requisition, authorizing such person to receive such fugitive from the proper authorities of the state on which such requisition is made, and to convey him to this state to be dealt with according to law. The agent so empowered, should also be furnished with a bench warrant, if the fugitive has been indicted; or if not, then with a warrant from the magistrate before whom the complaint was made, for the arrest and detention of the prisoner.

§ 87. Such requisition, with the proofs annexed, are then to be presented to the governor or chief magistrate of the state, upon whom the requisition is made, by the agent or person so authorized to receive and convey such criminal to this state. If, on inspection, such governor or chief magistrate shall find that such requisition is in due form, and that the proofs are sufficiently authenticated by the governor of this state, and that they show that a crime has been com-

mitted within the meaning of the constitution of the United States, and of the act of congress, he issues his warrant under his hand and seal of office, to the sheriff of the county where such fugitive is supposed to be. Such warrant is also directed, generally, to the sheriff, constable, and other peace officers of all the counties of the state, and requiring him and them to arrest and secure such fugitive, wherever he may be found, within the state, and to deliver him into the custody of the person authorized to receive him, to be taken back to the state from which he fled. The governor also delivers a duplicate of such warrant to the person so authorized to receive such fugitive.

§ 88. Under this warrant, it will be the duty of every sheriff, constable, or other peace officer, to whom the same is directed, and delivered, forthwith to arrest such fugitive, if he may be found within his jurisdiction, and to deliver him to the custody of the person or agent so authorized to receive him. When such warrant is issued by the governor of this state, for the arrest of a fugitive from another state, found here, under and pursuant to a requisition upon him for that purpose, the powers and duties of every sheriff, or other officer, to whom such warrant is directed and delivered for execution, are the same in all respects, as upon a warrant issued by any magistrate here for the arrest of one charged with crime against the laws of this state.

§ 89. The agent or person authorized to receive such fugitive, is empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person or persons shall, by force, set at liberty, or rescue the fugitive from such agent, while transporting him or her as aforesaid, such person or persons shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned, not exceeding one year.¹ When a fugitive from this state shall be brought here, under the requisition of the governor, he shall be taken to the county where the indictment was found, and delivered to the keeper of the common jail of the county, unless such prisoner desires to give bail, when he shall be taken before some officer of such county authorized to let to bail in such case. If no indictment has been found against the prisoner, then he shall be taken to the county where the warrant issued, and the same proceedings shall be had as to the examination of the prisoner, letting him to bail, or committing him to jail, as if the arrest had been made in this state.

§ 90. All costs and expenses in the apprehending, securing, and

¹ Laws U. S. Feb. 12, 1793, § 2, 1 Story's ed. 234.

transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory ¹ And it is provided by law in this state, that whenever the governor thereof shall demand the surrender of a fugitive from justice from the governor of any other state or territory, or foreign government, the accounts of the persons employed by him for that purpose, for their services, shall be audited by the comptroller, and paid out of the treasury.²

§ 91. When one flees from justice from another state or territory, and is found here, any magistrate authorized to issue a warrant for the arrest of one charged with crimes committed here,³ shall have power to issue process for the apprehension of such person. And the proceedings shall be in all respects similar to those under the statutes of this state for the arrest and commitment of persons committing offences within this state. If upon the examination it shall satisfactorily appear that such person has committed a criminal offence and is a fugitive from justice, such magistrate by warrant, reciting the accusation, shall commit such fugitive from justice to the common jail, there to be detained, for such time, to be specified in said warrant, as the said magistrate shall deem reasonable, to enable such fugitive to be arrested, by virtue of the warrant of the executive of this state, issued according to the act of congress, upon the requisition of the executive authority of the state or territory, in which such fugitive committed such offence, unless such person shall give bail in such sum as the magistrate may deem proper, conditioned that he will appear before such magistrate at such time as he shall deem reasonable, and will deliver himself up to be arrested upon the warrant of the executive of this state. The person thus arrested, detained or bailed, shall be discharged from such detention or bail, unless at or before the time designated in the warrant of commitment, or in the condition of the bond, he shall be demanded or arrested by the warrant of the executive of this state. It shall be the duty of the magistrate to make return to the next court of sessions of the county, of his proceedings in the premises; and it shall also be the duty of such court to inquire into the cause of the arrest and detention of such person; and if such person is in custody, or the time for his arrest as designated in the condition of the bail bond has not elapsed, the said court of sessions in its discretion, may discharge the said person from detention, or may order the said bail bond to be cancelled, or may continue his detention for a period beyond the time specified in the warrant of commitment, or may order new

¹ Laws U. S. Feb. 12, 1793, § 2, 1 Story's ed. 284.

² 3 R. S. 1043, § 52; 3 Park Cr. R. 503.

³ Ante, § 54.

bail to be given, conditioned for the surrender of the said person at a time shorter or longer than the time designated in the bail bond taken by the said magistrate; and if said person is in custody may take bail, conditioned for his appearance before said court, to be surrendered at such time as the said court may deem reasonable and proper.¹

7. WHERE RELIGIOUS MEETINGS ARE DISTURBED.

§ 92. No person shall wilfully disturb, interrupt or disquiet any assemblage of people, met for religious worship, by profane discourse, rude and indecent behavior, or by making a noise, either within the place of worship, or so near it as to disturb the order and solemnity of the meeting; nor shall any person within two miles of the place where any religious society shall be actually assembled for religious worship, expose to sale or gift, any ardent or distilled liquors, or keep open any huckster shop, or any other place, inn, store or grocery, than such as shall have been duly licensed, and in which such person shall have usually resided or carried on business; nor shall any person, within the distance aforesaid, exhibit any shows or plays, unless the same shall have been duly licensed by the proper authority; nor shall any person within the distance aforesaid, promote, aid, or be engaged in any racing of any animals, or in any gaming of any description; nor shall any person obstruct the free passage of any highway to any place of public worship, within the distance aforesaid.

§ 93. And it is made the duty of all sheriffs, and their deputies, coroners, marshals, constables, and other peace officers, who may be present at the meeting of any assembly for religious worship, which shall be interrupted or disturbed in the manner prohibited, to apprehend the offender, and take him before some justice of the peace, or other magistrate authorized to convict, to be proceeded against according to law. And all judges, mayors, recorders, aldermen, and justices of the peace, within their respective jurisdictions, upon their own view of any person offending as aforesaid, may order the offender into the custody of any such sheriff, or other peace officer, or of any official member of the church or society so assembled and disturbed, for safe keeping, until he shall be let to bail, or a trial for such offence be had.²

§ 94. The duties of the officer in making arrests, and bringing the prisoner before the magistrate, under a warrant for violation of any of the foregoing provisions are the same as under warrants of arrest for minor offences.³

¹ 3 R. S. 998, §§ 41-47.

³ Ante, § 69.

² 2 R. S. 934, §§ 58, 60, 61.

§ 95. If the person arrested shall demand a trial by jury, the justice shall issue a venire to any constable of the county, or marshal of the city where the offence is to be tried, commanding him to summon the same number of jurors, and in the same manner as is provided for summoning jurors before courts of special sessions.¹

§ 96. If any person convicted of any such offence, shall not immediately pay the penalty incurred, with the costs of the conviction, or give security, to the satisfaction of the officer, before whom the conviction shall be had, for the payment of such penalty and costs, within twenty days thereafter, he shall be committed by warrant, to the common jail of the county, until the same be paid, or for such term, not exceeding thirty days, as shall be specified in the warrant.²

S. THEIR DUTIES UNDER PEACE WARRANTS.

§ 97. A warrant for the arrest of one to compel him to give security to keep the peace, shall be similar in form to warrants for the arrest of a person charged with the commission of crime; and it may be issued by the same officers and no others.³ The warrant must be under the hand of the magistrate issuing it, and it may be with or without seal.⁴ It need not contain a formal adjudication that there is reason to fear the commission of the offence threatened. But it would seem that it should at least appear upon its face, that complaint had been made in writing, and on oath, to the magistrate who issued the same.⁵

§ 98. The warrant should be executed by the officer to whom the same is directed and delivered, in the same manner as a warrant for the arrest of one charged with crime. But if the magistrate issuing such warrant, be an officer of limited jurisdiction, as a justice of the peace, alderman or the like, the arrest can only be made within the county where such warrant issued. On making the arrest the officer must bring the party forthwith before the magistrate issuing the warrant; and he shall be detained by such officer, under the direction of such magistrate, as in criminal cases, until he is discharged or gives the security as hereinafter mentioned, or is committed to jail for want thereof.

§ 99. When the party has been brought before the magistrate, he may be required by him to enter into a recognizance in such sum, not exceeding one thousand dollars, as such magistrate shall direct, with

¹ 2 R. S. 935, § 63.

² 2 R. S. 935, § 62.

³ Ante, § 54.

⁴ 5 Parker C. R. 651, *Gano v. Hall*.

⁵ 2 R. S. 991, §§ 1, 2, 3; 17 Wend. 181, *Bradstreet v. Ferguson*; 23 Wend. 638, *The Same v. The Same*.

one or more sufficient sureties, to appear at the next court of sessions, to be held in such county. If such recognizance shall be given, the party complained of shall be discharged. But if he refuse to find such security, it shall be the duty of the magistrate to commit him to prison, until he shall find the same, specifying in the warrant, the cause of such commitment and the sum in which such security was required.¹ But it is not necessary to state the offence with which the party is charged with having threatened to commit. It is enough if it state the requirement to give security and the refusal to do so.²

§ 100. Any person committed to jail for not finding sureties for the peace as above prescribed, may be discharged by any two justices of the peace of the county, upon his giving such security as was first required of him.³ After the record of commitment shall have been filed with the clerk of the county, one justice cannot accept such security. Two justices must unite.⁴

§ 101. It is farther provided that every person who, in the presence of a magistrate authorized to issue a warrant in such case, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offence against his person, or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court without any other proof, to give security as above specified, and in default he may commit such person to jail until he shall give the same.⁵

9. DISORDERLY PERSONS.

§ 102. The warrant for the arrest of a disorderly person, shall be issued by a justice of the peace, and be in the same form as in the case of a warrant for the arrest of one for crime; and the arrest should be made in the same manner, if the party can be found within the county where the warrant was issued; and he shall be brought forthwith before the justice. And on being so brought before such justice, he may require of the offender sufficient sureties for his or her good behavior for the space of one year. In default of such sureties being found, the justice shall make up, sign and file in the county clerk's office, a record of such conviction, specifying generally the nature and circumstances of the offence, and shall by warrant under his hand, commit such offender to the common jail of the city

¹ 3 R. S. 991, §§ 4, 5.

² 17 Wend. 181, and 23 Wend. 638, *Bradstreet v. Ferguson*.

³ 3 R. S. 991, § 6.

⁴ 23 Wend. 47, *The People v. Brown*.

⁵ 3 R. S. 991, § 8.

or county, there to remain until such sureties be found, or such offender be discharged according to law.¹

§ 103. Any person committed to the common jail for not finding sureties for good behavior, may be discharged by any two justices of the peace of the county, upon giving such sureties for good behavior as were originally required from such offender. After the record of conviction has been made and filed, the magistrate who made the commitment cannot accept of the sureties originally required by him, and discharge the party. Two justices must unite to accept the security.²

10. BEGGARS AND VAGRANTS.^a

§ 104. All idle persons who, not having any visible means to maintain themselves, live without employment; and all persons wandering abroad and lodging in taverns, groceries, beer houses, out houses, market places, sheds or barns, or in the open air, and not giving a good account of themselves; all persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highway, passages, or other public places, to beg or receive alms, shall be deemed vagrants.³

§ 105. It shall be the duty of every constable or other peace officer, whenever required by any person, to carry such vagrant before a justice of the peace of the same town, or before the mayor, recorder, or any of the aldermen of the city in which such vagrant shall be, for the purpose of examination.⁴

§ 106. If such magistrate shall be satisfied by the confession of the offender, or by competent testimony, that such person is a vagrant within the description aforesaid, he shall make up and sign a record of conviction thereof, which shall be filed in the office of the county clerk, and shall by warrant, under his hand, commit such vagrant, if he be not a notorious offender, and be a proper object for such relief, to the county poor house, if there be one, or to the alms house or poor house of such town or city, for any time, not exceeding six months, there to be kept at hard labor; or, if the offender be an improper person to be sent to the poor house, then he shall be committed to the bridewell, or house of correction, of such city or county, if there be one, and if none, to the common jail of such county, for a term, not exceeding sixty days, there to be kept, if the

¹ 2 R. S. 903, § 2.

² 2 R. S. 904, § 6; 23 Wend. 47, The People v. Brown.

³ 2 R. S. 879, § 1.

⁴ 2 R. S. 879, §§ 1, 2.

^a Ark.—Dig. 1858, p. 1065.

Neb.—R. S. 676,

justice think proper so to direct, upon bread and water only, for such time as he shall direct, not exceeding one-half of the time for which he shall be committed.¹ And if any child shall be found begging for alms, or soliciting charity from door to door, or in any street, highway or public place of any city or town, any justice of the peace, on complaint and proof thereof, shall commit such child to the county poor house, if there be one, or to the alms house, or other place provided for the support of the poor.²

§ 107. Every person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent him from being identified, shall appear in any public highway, or in any field, lot, wood or enclosure, may be pursued and arrested by any sheriff, deputy sheriff, constable, marshal of a city, or other public peace officer, or other citizen of the county where such person or persons shall be found disguised as aforesaid, and who may, of his own authority, and without process, arrest, secure, and convey to any magistrate authorized to issue a warrant for the arrest of persons charged with any offence,³ residing in the county where such arrest shall be made, any person who shall be found having his face painted, discolored, covered or concealed, or being otherwise disguised, as aforesaid, to be examined and proceeded against; and it shall be the duty of any sheriff, deputy sheriff, constable, marshal or other peace officer, whenever any of them shall discover any person with his face so painted, discolored, covered or concealed, or being otherwise disguised as aforesaid, immediately to arrest, secure and convey such person to any such magistrate, to be proceeded with according to law; and whenever any such officers shall receive credible information of any person having his face so painted, discolored, covered or concealed, or being otherwise disguised as aforesaid, it shall be the duty of every such officer forthwith to pursue such person, and arrest, secure and convey him to any such magistrate.⁴

§ 108. In the execution of the duties above prescribed, any sheriff, constable, marshal, or other peace officer shall be authorized to command any male inhabitant of his county, or as many as he shall think proper, to assist him in seizing, arresting, confining, and conveying to any such magistrate, and in committing to the common jail of the county, every person with his face so painted, discolored, covered or concealed, or being otherwise disguised as aforesaid; and any inhabitant so commanded, may provide himself, or be provided with such means and weapons as the officer giving such command shall desig-

¹ 2 R. S. 879, § 3.

² 2 R. S. 879, § 4.

³ Ante, § 54.

⁴ 4 R. S. 880, §§ 5, 6.

nate. And every person so commanded, who shall refuse or neglect, without lawful cause, to obey such command, shall be deemed guilty of a misdemeanor, and be subject to a fine not exceeding fifty dollars, or to imprisonment, not exceeding one year, or to both.¹

§ 109. Any magistrate to whom complaint shall be made, that any person has appeared in the public highway, or in any lot, field, woods, or enclosure, with his face so painted, discolored, covered or concealed, or being otherwise disguised as aforesaid, may, in his discretion, by warrant under his hand, depute and empower any elector of the county to arrest, seize, confine, and bring such person before such magistrate, to answer such complaint. And in any such warrant, or in any other warrant or process against any person charged with having his face so painted, discolored, covered or concealed, or being otherwise disguised as aforesaid, whose name shall not be known, it shall be sufficient to describe the offender by some fictitious name.²

§ 110. When any such person shall have been arrested and brought before any judge, or other officer authorized to issue process for the apprehension of persons charged with any offence of the same county where he shall be arrested, and who shall not give a good account of himself, shall be deemed a vagrant, within the provisions of the second title of chapter twenty of the first part of the Revised Statutes; and, on conviction by his own confession, or by competent testimony, shall be committed to and be imprisoned in the county jail of the county where such person shall be found, for a term not exceeding six months.³

11. TO PREVENT GAMING.^a

§ 111. On the day of any militia parade or rendezvous, or of any town meeting, or of any annual or special election, or on the day of the assembling of any of the inhabitants of this state, to celebrate the anniversary of American independence, no person shall expose to the public, or have in his possession, within half a mile of the place of such parade, rendezvous, town meeting, election or celebration, any co-table, wheel of fortune, or other gaming table, or gaming machine or box; and every person offending against this provision, shall forfeit twenty-five dollars, to be recovered by and in the name of the overseers of the town where the offence was committed, for the use of the

¹ 2 R. S. 880, §§ 7, 8.

² 2 R. S. 880, § 5.

² 2 R. S. 881, § 9.

^a Ill.—1 St. 396.
O.—1 R. S. 663.
Conn.—Rev 1. 866, p. 484.

Ky.—1 R. S. 563.
Miss.—Rev. Code 593.
Wis.—R. S. 961, 972.

poor. And it shall be the duty of all sheriffs, and of all other executives, judicial or ministerial officers, concerned in the administration of justice, to break, burn, or otherwise destroy every such table, box and machine so exposed or possessed contrary to the above provisions.¹

§ 112. And if any person, for gambling purposes, shall keep or exhibit any gambling table, establishment, device or apparatus, or if any person or persons shall be guilty of dealing "faro" or banking for others to deal "faro," or acting as "look-out" or gamekeeper, for the game of "faro," or any other banking game, where money or property is dependent on the result; or if any person shall sell or vend lottery policies, purporting to be governed by the drawing of any public or private lottery; or if any person shall endorse a book or any other document for the purpose of enabling others to sell or vend lottery policies, he shall be taken and held as a common gambler, and upon conviction thereof, shall be sentenced to not less than ten days hard labor in the penitentiary, or not more than two years hard labor in the state prison, and be fined in any sum not more than one thousand dollars, to be paid into the county treasury where such conviction shall take place, for the use of the common schools therein, to be divided among the school districts in that county, in the same manner as the school money of the state is divided among said districts, and in default thereof, shall remain imprisoned until such fine be remitted or paid.²

§ 113. If any person shall keep a room, building, arbor, booth, shed, tenement, boat or float, to be used or occupied for gambling, or shall knowingly permit the same to be used or occupied for gambling, or if the owner, superintendent or agent of any room, building, arbor, booth, shed, tenement, boat or float, shall rent the same to be used or occupied for gambling, he shall, on conviction thereof, be fined in any sum not less than fifty, nor more than five hundred dollars.³

§ 114. If any commander, owner or lessee of any boat or float shall knowingly permit any gambling for money or property, on such boat or float, and shall not, upon his knowledge of the fact, immediately prevent the same, he shall, upon conviction thereof, be held responsible for the money or property so lost, and fined in any sum, not more than five hundred dollars.⁴

§ 115. If any person shall, through invitation or device, persuade or prevail on any person to visit any room, building, arbor, booth, shed, tenement, boat or float, kept for the purpose of gambling, he

¹ 2 R. S. 923, §§ 4, 5.

² 2 R. S. 926, § 23.

³ 2 R. S. 926, § 22.

⁴ 2 R. S. 928, § 28.

shall, upon conviction thereof, and upon proof that the person so invited, has gambled therein, be held responsible for the money or property lost by such person so invited or persuaded, by reason of such invitation or device, and in addition thereto, he shall be fined and imprisoned as mentioned in the preceding section one hundred and twelve.¹

§ 116. And every sheriff or constable to whom the warrant of any magistrate or police justice of any town or city, shall be directed and delivered for the arrest of any person charged with any offence under the statutes of this state against gaming, shall execute the same according to the command thereof. And if any such warrant shall show, upon its face, that an affidavit has been made and filed with the magistrate issuing it, stating that the affiant has reason to believe and does believe that the person against whom such warrant is issued, has upon his person, or at any other place named in such affidavit, and set forth in such warrant, any specified articles of personal property, or any gaming table, device or apparatus, or any lottery policies public or private, the discovery of which might lead to establish the truth of such charge; and if said warrant also commands the officer to whom the same is directed and delivered to make diligent search for such property and table, device or apparatus, and if found, to bring the same before such magistrate, it shall be the duty of such officer to search the person of said party, or the place so designated in such warrant for the discovery of the property so designated and in the execution of such warrant, the officer will have the same power and authority as upon the execution of a search warrant for stolen or embezzled property. If the officer shall discover such property he shall seize and deliver the same to the magistrate or justice before whom he takes the same, who shall retain possession of said property, and be responsible therefor until the discharge or commitment or letting to bail of the person so charged, and in case of such commitment or letting to bail, such officer shall retain such property subject to the order of the court before which such offender may be required to appear, until his discharge or conviction. And in case of the conviction of such person, the gambling table, device or apparatus shall be destroyed, and the household property and other fixtures belonging to such gambling place shall be held liable to be sold to pay any judgment and costs which may be rendered against such person; and after the payment of such judgment and costs, the surplus, if any, shall be paid into the treasury of the county where such prosecution

¹ 2 R. S. 928, § 26.

shall take place, to be divided among the school districts of the county, as provided in section one hundred and twelve. And in case of the discharge of such person by the magistrate or court, the officer having such property in his custody, shall, on demand, deliver it to such person.¹

§ 117. And every sheriff or constable shall also execute the warrant of any justice of the peace, police justice, chief magistrate of any municipal corporation, or judge of any court of record, to whom the same is directed and delivered, to seize any gambling tables, apparatus, establishment or device kept by any person for the purpose of being used to win or gain money or other property, or by any other person, or any lottery policies of any lotteries; which warrant, if the same so directs, will authorize such sheriff or constable within his proper jurisdiction, after demanding entrance, to break open and enter any house or place wherein such gambling table, establishment, apparatus or device shall be kept, and to deliver the same to the mayor of the city, president of the village, supervisor of the town, or clerk of the county where such seizure shall be made, who shall keep the same until the term of the court at which the case shall be tried, and the court shall then, if there be no necessity of keeping the property to be produced on the trial of an offender against the statute, have a jury summoned to try the fact whether the property taken, was or is used for gambling, and if the finding shall be that the property was used for gambling, the court shall order such property to be broken up and sold by the sheriff of the county, and the proceeds shall, after the payment of costs, go into the treasury of the county,² for the use of the common schools thereof, to be divided among the districts thereof as herein before mentioned.³

§ 118. It shall be the duty of all sheriffs, police officers, constables and prosecuting or district attorneys, to inform against and prosecute all persons whom they shall have credible reason to believe are offenders against the provisions of the act of 1851, against gaming, and for refusal so to do, they shall be guilty of a misdemeanor, and punished by a fine of not more than five hundred dollars.⁴

12. TO PREVENT RACING.

§ 119. It shall be the duty of all officers concerned in the administration of justice, to attend at the place where they shall know or be informed that any race is about to be run, contrary to the provisions of law, and there give notice of the illegality thereof, and

¹ 2 R. S. 927, § 24.

² 2 R. S. 927, § 25.

³ Ante, § 112.

⁴ 2 R. S. 928, § 27.

endeavor to prevent such race, by dispersing the persons collected for the purpose of attending the same, and by all other ways and means in their power. Upon their own view of any person offending against the provisions of law against racing, as well as upon the testimony of others, such judges and justices shall issue warrants for the immediate apprehension of the persons so offending, to the end that they may be compelled to enter into recognizances with sufficient sureties for their good behavior, and for their appearance at some proper court to answer for said offence.¹

13. TO PREVENT PRIZE FIGHTING.

§ 120. All prize fighting between persons, game birds or game, cocks, dogs or bulls or bears, or between dogs and rats or dogs and badgers, or any other animal is prohibited. And any magistrate having power to take complaints of a criminal nature may, on complaint, issue a warrant to any officer of the county having power to execute a warrant, reciting therein the name of the complainant and his residence, and the substance of his complaint, and therein directing such officer to proceed and prevent the said fight by arresting any person or persons found wilfully witnessing the same; and he may call to his aid the civil power of his county; and upon any arrest the persons so arrested shall be taken before the magistrate who issued the warrant.²

§ 121. Every person who shall, in this state, set on foot or aid or abet in any way any prize fight between two persons, either within or without the state; and every person who shall, in this state, send in writing, or publish any challenge, or acceptance of any challenge for such fight, and every person who shall, within this state, assist any person in training for such fight; and every inhabitant of this state who shall go out of it to engage, take part in, or to be present at such fight, shall be guilty of a misdemeanor. And if it shall be made to appear to any magistrate having power to hear complaints in criminal cases, that there is reasonable ground to apprehend that any of the above mentioned offences is about to be committed, such magistrate shall issue his warrant to the sheriff or constable of his county, for the arrest of the person or persons so about to offend; and if such persons, on being brought before him, shall omit or refuse to enter into the required bond, the magistrate shall commit such persons to the county jail, there to remain until discharged by a court of record having criminal jurisdiction. But he may at any time be discharged on habeas corpus, by executing such bond. And it is made

¹ 2 R. S. 932, § 50.

² 3 R. S. 980, §§ 57, 58.

the duty of all sheriffs, constables, policemen and watchmen who shall have reasonable grounds to believe that any of the above offences is about to be committed within their jurisdiction, to make complaint to some magistrate within their jurisdiction; and if any such officer shall wilfully neglect his duty in this respect he shall, upon conviction, be deemed guilty of a misdemeanor, and shall also forfeit his office.¹

14. TO PREVENT CRUELTY TO ANIMALS.

§ 122. Cruelty to animals is forbidden in this state, and so is carrying an animal in a vehicle in a cruel and inhuman manner; and whenever any person offending shall be taken into custody therefor by any officer, such officer may take charge of such vehicle and its contents, and deposit the same in some safe place of custody; and any necessary expense which may be incurred for taking charge of and keeping and sustaining the same shall be a lien thereon, to be paid before the same can lawfully be removed. Or the said expenses or any part remaining unpaid may be recovered of the owner in any action therefor. And any agent of the American Society for the prevention of cruelty to animals, upon being designated by the sheriff of any county in this state, may within such county make arrests and bring before any court or magistrate thereof having jurisdiction, offenders found violating the provisions of the act.²

15. TO PREVENT INTEMPERANCE.

§ 123. It is made the duty of every sheriff, under sheriff, deputy sheriff, constable, marshal, police or officer of police, to arrest all persons found actually engaged in the commission of any offence in violation of the act of 1857, entitled "An act to suppress intemperance and regulate the sale of intoxicating liquors," and forthwith to carry such person before any magistrate of the same city or town, to be dealt with according to the provisions of such act. And it shall be the duty of every such officer, whenever he shall find any person intoxicated in any public place, to apprehend such person and take him before some magistrate of the city or town; and if such magistrate shall, after due examination, deem him too much intoxicated to be examined, or to answer on oath correctly, he shall direct such officer to keep him in some jail, lock-up or other safe and convenient place, until he become sober, and thereupon forthwith to bring him before said magistrate. And it is declared that it shall be the duty of such officers to arrest or cause to be arrested all such persons

¹ 4 R. S. 666, §§ 1, 2, 3, 4.

² Laws 1867, ch. 375, §§ 1-8.

when so intoxicated, and of the magistrate to entertain such complaints and make such examination, under the penalty of fifty dollars, with full costs of suit for any neglect to comply with the provisions of section seventeen of said act.¹

16. TO INVESTIGATE THE ORIGIN OF FIRES.

§ 124. Whenever it shall be made to appear by the affidavit of a credible witness, that there is ground to believe that any building has been maliciously set on fire or attempted to be, any coroner, sheriff or deputy sheriff in the county in which such crime is supposed to have been committed, to whom such affidavit shall be delivered, and who shall be requested in writing by the president, secretary or agent of any insurance company, or by two or more reputable freeholders, to investigate the truth of such belief, shall do so without delay, and for this purpose he shall possess all the powers conferred upon coroners for the purpose of holding inquests by the first four sections of article first of title seventh of chapter second of part first of the Revised Statutes.² The jury, after inspecting the place where fire was attempted, and after hearing testimony, shall deliver to the officer holding such inquest their inquisition in writing to be signed by them, in which they shall find and certify how and in what manner such fire happened or was attempted, and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner. But if such jury shall be unable to ascertain the origin and circumstances of such fire, they shall find and certify accordingly. If they find that any building has been designedly set on fire, or has been attempted so to be, the officer holding such inquest shall bind over the witnesses to appear and testify at the next criminal court, at which an indictment for such offence can be found, that shall be held in the county. If the party charged with the offence be not in custody, the officer holding such inquest, shall have power to issue process for his arrest in the same manner as justices of the peace, and to examine the party arrested as is possessed by justices of the peace, and shall in all respects proceed in like manner. The testimony of all witnesses examined before the jury shall be reduced to writing by the officer holding the inquest, and shall be returned by him, together with the inquisition and all recognizances and examination taken by him, to the next criminal court of record in the county. The compensation of the officer holding the inquest, and their actual and neces-

¹ 2 R. S. 942, §§ 17, 18; Laws 1869, ch. 856.

² See Duties of Coroners, Ch. 3.

sary expenses, shall be fixed, audited and paid in the same manner as the compensation and expenses of coroners are now provided for by law. But these powers do not extend to the cities of New York, Brooklyn or Buffalo.¹

17. THEIR DUTIES UNDER THE ELECTION LAWS.

§ 125. If any person shall refuse to obey the lawful commands of the inspectors of elections, or by disorderly conduct in their presence or hearing, shall interrupt or disturb their proceedings, they may make an order directing the sheriff or any constable of the county, to take the person so offending into custody and detain him until the final canvass of the votes shall be completed ; but such order shall not prohibit the person so taken into custody from voting at such election. And such order shall be executed by any sheriff or constable to whom the same shall be delivered ; or, if none shall be present, by any other person deputed by such board, in writing. Officers presiding at a town meeting or election, are authorized to order the removal of disorderly persons from the room verbally, and without warrant, and an officer who executes such verbal order is not liable to an action therefor.²

§ 126. It shall be the duty of every inspector of elections, sheriffs, constables, and justices of the peace, within the state, knowing or having good reason to believe that any of the following offences under the election law has been committed, to give information thereof to the district attorney of the county, in which the offence has been committed, whose duty it shall be to adopt effectual measures for the punishment of all persons violating the provisions of said law :³

1. That any elector challenged as unqualified, has been guilty of wilful and corrupt false swearing or affirming, in taking any oath or affirmation prescribed by the election laws ;

2. That any person has wilfully and corruptly procured any person to swear and affirm falsely as aforesaid ;

3. That any officer on whom any duty is enjoined by the election laws of this state, has been guilty of any wilful neglect of such duty, or of any corrupt conduct in the execution of the same ;

4. That any person has by bribery, menace or other corrupt means or device whatsoever, either directly or indirectly attempted to influence any elector of this state in giving his vote or ballot ; or deterred

¹ 2 R. S. 989, §§ 1-8.

² 1 R. S. 449, § 14.

³ 1 R. S. 433, §§ 38, 39 ; 17 Wend. 522,
Parsons v. Brainard.

him from giving the same ; or disturbed or hindered him in the free exercise of the right of suffrage, at any election in this state :

5. That any officer or other person has called out or ordered any of the militia of this state, to appear and exercise on any day during any general election, or within five days previous thereto, except in cases of invasion or insurrection ;¹

6. That any candidate for an elective office, or any other person for him, with intent to promote his election, has provided or furnished entertainment at his expense, to any meeting of electors previous to, or during the election at which he shall be a candidate ; or paid for, procured or engaged to pay for any such entertainment ; or furnished any money or other property to any person for the purpose of being expended in procuring the attendance of voters at the polls ; engaged to pay any money, or deliver any property, or otherwise compensate any person for procuring the attendance of voters at the polls ; or contributed money for any other purpose intended to promote an election of any particular person or ticket, except for defraying the expenses of printing, and the circulation of votes, handbills, and other papers previous to any such election, or for conveying sick, poor or infirm electors to the polls ;²

7. That any one has fraudulently or deceitfully changed or altered a ballot of any elector, or furnished an elector any ballot containing more than the proper number of names, or caused any other deceit to be practiced, with intent fraudulently to induce such elector to deposit the same as his vote, and thereby to have the same thrown out and not counted ;

8. That any one has wilfully disobeyed any lawful commands of the board of inspectors of any election, or has wilfully, and without lawful authority, obstructed, hindered or delayed any elector on his way to any poll where an election was to be held ; or while he is exercising, or attempting to exercise the right of voting ; or has aided or assisted in such obstruction or delay ;

9. That any person has knowingly voted, or offered to vote in any election district in which he does not reside ; or has voted, or offered to vote more than once, either at the same or at any other election district ;

10. That any person has procured, aided, assisted, counselled or advised another to give or offer his vote, knowing that such person was not duly qualified to vote at the place where the vote was given or offered ;

¹ 1 R. S. 447, §§ 1, 2, 3, 4, 5.

² 1 R. S. 448, § 6 ; 5 Hill 27, and 7 Hill 387, *Walker v. Jackson*.

11. That any one has procured, aided, assisted or counselled another to go into any town, ward or election district, for the purpose of giving his vote at any election, knowing that the person was not duly qualified to vote therein ;

12. Or that any person, not duly qualified to vote under the laws of this state, has knowingly voted, or offered to vote at any election.¹

CHAPTER VIII.

OF LETTING PRISONERS TO BAIL.

§ 127. The duties of an officer having one in custody, upon any criminal charge, who is entitled to be let to bail, and who desires to give bail, are simply that he take such prisoner before some proper magistrate or court authorized to let to bail in the particular case ; and if such court or magistrate shall take from the prisoner a recognizance, and order him to be discharged, then that he release him accordingly. And it will be immaterial to the officer whether the recognizance so taken is in a sufficient amount, or in legal and proper form, or whether the sureties thereto are sufficient or otherwise competent. These are matters of which the court or magistrate must judge, and with which the officer has nothing to do. But if the justice assumes to let to bail in a case where he has no authority to act, the officer holding such prisoner should not discharge him. And if he does, it will be an escape, and he should retake him.²

§ 128. The magistrate before whom a prisoner is examined and by whom he is committed, is the proper officer to let such prisoner to bail. But if the magistrate is not authorized to take bail in the particular case, then after he has made out his warrant of commitment, the officer having the prisoner in charge, and to whom such mittimus is delivered, shall, if the prisoner so desires, take him before some court or officer authorized to let him to bail in such case. The proceedings upon the arrest and letting to bail of one in a county different from that in which the warrant issued, has been already pointed out.³ Where one has been arrested upon a bench warrant, in the county where the warrant issued, the officer making the arrest shall in like manner, take such prisoner before the proper court or magistrate if the prisoner desires to be discharged on bail. But when he is arrested in a county other than that in which the warrant issued, if the offence charged is punishable by death or imprisonment in the state prison, he must be taken back to the county in which the

¹ 1 R. S. 448, §§ 7, 9, 10, 11, 12, 13.

³ Ante, § 74.

² 6 Hill, 344, *Clark v. Cleveland*.

warrant issued, whether the warrant is a bench warrant, or the warrant of a magistrate before indictment.¹

§ 129. Where any prisoner is so entitled to be let to bail, it is usual and proper for the officer holding the warrant of commitment, or the bench warrant, to allow the prisoner such time, as under the circumstances of the case, may be deemed reasonable and proper for him to secure proper sureties. But if, at the expiration of such reasonable time, he fails to obtain the required sureties, it will be the duty of the officer holding such warrant, to commit the accused to prison, when his duties under the warrant, unless he be the sheriff or keeper of the jail, will be at an end.

§ 130. Where one has been committed to jail, for want of sureties to keep the peace, or, as a disorderly person, for want of sureties for good behavior, such person may be discharged by any two justices of the peace of the county, upon giving such sureties of the peace, or for good behavior, as were originally required.² And on such justices certifying the fact of having taken the proper sureties, to the jailer, and directing the discharge of such prisoner, he shall be discharged accordingly.

§ 131. Where one under a criminal charge, is unable to find the required sureties before he is actually committed to jail, it is usual for the committing magistrate, or any magistrate before whom such prisoner may have been brought to be let to bail, to take a recognizance from him at any time after he has been so committed, and thereupon such magistrate certifies to the jailer the fact of his having taken such recognizance, and directs the prisoner's discharge, as in the case of one committed as a disorderly person, or for want of sureties to keep the peace.³ But where such subsequent application to be let to bail, is made to a different magistrate, such officer cannot act until the prisoner shall have been duly brought before him. If the prisoner is committed to, and is actually in the jail, this can only be done upon writ of habeas corpus, duly granted and returnable before such officer; for after one is so committed, no officer can order a prisoner to be brought out of jail, except upon such writ. But the officer may go to the jail, where the prisoner is confined, and there take the proper recognizance. If the application for a discharge upon bail is made to any court authorized to let to bail in the particular case, such court may authorize the jailer having the prisoner in custody, to bring him before such court, by order, without writ of habeas corpus. Where a certiorari has been issued under the statute,

¹ 6 Hill 344, *Clark v. Cleveland*; 21 How. 85, *In the matter of Gorsline*.

² 2 R. S. 904, § 6; 3 R. S. 991, § 6.

³ 1 Chitty's Cr. L. 101; Barb. Cr. L. 580

and the officer or court before which the same was made returnable, has by order, certified by the clerk of such court, or by the officer granting the same, directed the sum in which such person shall be held to bail, and the court at which he shall be required to appear, and that on such bail being entered into, such prisoner shall be discharged ;¹ upon the production of such order to the county judge of the county, he shall be authorized to take the recognizance of the person so detained, and of two sufficient sureties, in the sum so directed, with a condition for the appearance of such person at the court designated in such order.² And such judge shall certify on such order, the compliance therewith, and the production of the same, so certified, shall entitle such prisoner to be discharged from imprisonment for the crime which shall have been returned to such certiorari.³

§ 132. The Revised Statutes provide that officers before whom persons charged with crime shall be brought before indictment, shall have power to let to bail, as follows :⁴

1. Justices of the supreme court, in all cases ;⁵
2. A judge to the county courts, in all cases triable in a court of general sessions ;
3. A justice of the peace or alderman of a city ; and in the city of New York, a special justice or an assistant justice, in all cases of misdemeanor, and in all cases of felony, where the imprisonment in the state prison cannot exceed five years ;
4. The police justices in the city of New York shall respectively have power to let to bail, in all cases where a judge of the court of general sessions in said city is authorized by law to let to bail.

There are certain other officers, in particular localities, clothed with some of the powers of justices of the supreme court at chambers, or of county judges, and who of course would be authorized to let to bail in the same cases, and under the same circumstances, within their jurisdiction, as such last named officers.

§ 133. The supreme court may let to bail in all cases.⁶ The court of oyer and terminer held in any county, shall have power to let to bail, any person committed before indictment found upon any criminal charge whatever.⁷ And the court of sessions of any county, shall have power to let to bail persons committed to the prison of such county, before indictment found, for any offence triable in such

¹ 3 R. S. 890, § 70.

² 3 R. S. 890, § 71.

³ 3 R. S. 890, § 72.

⁴ 3 R. S. 997, § 31.

⁵ 8 Barb. 162, *The People v. Van Horn.*

⁶ 8 Barb. 162, *The People v. Van Horn.*

⁷ 3 R. S. 997, § 32.

court.' In addition to these courts, there are certain others, in particular localities, of limited jurisdiction, authorized to let to bail in cases cognizable before such last mentioned courts.

§ 134. In the cases where by law, persons indicted may be let to bail for their appearance at the court having cognizance of the offence, they may be so let to bail by the court having jurisdiction to try the offence charged; or if such court be not sitting, by any justice of the supreme court; and if the offence charged may be tried in a court of sessions, such persons may be let to bail by any judge of the county courts of the county where such indictment was found and by no other officer.²

§ 135. Where one convicted of crime, brings a writ of error, and the bill of exceptions has been settled and signed, if the justice of the supreme court, or county judge, who presided, or any justice of the supreme court, shall certify on such bill, that in his opinion there is probable cause for the same, or so much doubt as to render it expedient to take the judgment of the supreme court thereon; such certificate on being filed with the clerk of the court, shall stay judgment on such indictment until the decision of the supreme court be had on such exceptions. And upon such certificate being granted in any case, where the offence charged is punishable by imprisonment in a state prison, or county jail, the court in which the trial shall have been had, or any justice of the supreme court may let the defendant to bail, upon recognizance with sufficient sureties, conditioned that he shall appear in the court where such trial was had, at such time as the supreme court shall direct, and that he will obey any order or judgment the supreme court shall make in the premises.³

§ 136. When any court of oyer and terminer, court of sessions or superior court shall be sitting in Erie county, no judge at chambers shall be authorized, without the written consent of the district attorney, to bail any prisoner in jail, or without such consent, to bail any prisoner in jail, if an application in behalf of such prisoner shall have been made to any such court for that purpose, and such application shall have been denied, or if the party shall have had an opportunity to apply to such court and shall have neglected to make such application. And no person committed to jail in said county, after indictment found against him, shall be admitted to bail without the written consent of the district attorney, except by some court having jurisdiction to try the offence charged in the indictment, or by a justice of the supreme court, or the county judge of said county.⁴

¹ 3 R. S. 997, § 33; 3 Park. Cr. R. 531.

² 3 R. S. 1028, §§ 25, 26, 28.

³ 3 R. S. 1020, §§ 59, 60; 8 Barb. 162,

⁴ 3 R. S. 998, § 38

The People v. Van Horn.

§ 137. One let to bail in a civil case, or on a criminal charge, is, in supposition of law, in the custody of his sureties, who are considered as his keepers. It is said of them that they have their principal on a string, and that they may pull it whenever they please, and so surrender him in their own discharge. They may seize or take him at any time, whether in the day or night, or upon Sunday, and at any place, whether within the county where let to bail, or in another county, or even in another state or country. It is a contract between the principal and his sureties, valid at the common law, and the municipal authorities of the state where the principal is seized, will not interfere to release him, but will rather promote his arrest by his bail. He may be retaken even in church, or while he is attending court as a suitor; and his dwelling ceases any longer to be a castle to him, even in civil cases, for his bail have as much right to go into his house as he himself, and when they please to take him, and if entrance is refused, they may break open his doors to come at him and seize him even in his bed. And if the principal resides in the house of another, the bail may enter, if the doors are open, to seek for him whether he is found there or not. And so the executor or administrator of the bail may in like manner, surrender the principal of the deceased. In making the arrest and in surrendering their principal, the bail may command the cooperation of the sheriff or any of his officers.¹

§ 138. Such bail may also deputize another to seize the defendant; and such agent will have the same powers in respect thereto as the bail themselves.² And though such agent may be a public officer, he acts in such case only as the agent for the bail, and not in his official capacity; especially where the arrest is made out of the state. And it has been held, that where a constable was so authorized to arrest a prisoner for the bail, that a note or agreement conditioned that such prisoner should appear at the next term of the court where he had been recognized to appear, taken by such constable of the party whom he arrested in Virginia, was not within the statute against the taking of securities *colore officii* by a public officer, and that such constable might, on default of the defendant to appear, recover on such security.³

§ 139. The proper mode of proceeding by bail in a criminal case,

¹ 2 Hill 216, *Harp v. Osgood*; 7 John. 145, *Nicolls v. Ingersoll*; 1 John Ca. 413, *Boardman v. Fowler*; 6 Mod. 231, *Anonymous*; 2 H. Bl. 120, *Shears v. Brooks*; 1 Bos. & Pull. 61, *Meddowscraft v. Sutton*; 8 Pick. 138, *Commonwealth v. Brackett*.

² 2 Hill, 216, *Harp v. Osgood*; 1 John Ca. 413, *Boardman v. Fowler*; 7 John 145, *Nicolls v. Ingersoll*; 3 Conn. 84, *Parker v. Bidwell*; 4 Conn. 166, *Read v. Case*.

³ 2 Hill 216, *Harp v. Osgood*.

where they seek to surrender their principal, is to procure a copy of the recognizance from the clerk of the court with which the same is filed, duly certified by such clerk. If an agent is appointed by such bail to make the arrest, his appointment and authority should be in writing, endorsed upon such certified copy of recognizance, or annexed to it, under the hand of such bail. And when the arrest is made, the prisoner should be forthwith brought before the court which took such recognizance, or before which he was recognized to appear, if such court be in session, when he may be surrendered into custody, and, in a proper case, the bail will be discharged. If he was let to bail by a magistrate, he should be brought before such magistrate, who shall commit him to the jail of the county, as upon the original examination. If such court is not in session, or the magistrate who took the recognizance cannot be found, or has gone out of office, or does not reside in the county where the prisoner was recognized to appear, such bail shall, by endorsement upon such copy of recognizance, certify that they have so arrested such prisoner as such bail, and that they thereby surrender him into the custody of the keeper of the common jail of the county, to be released from such recognizance; and such certified copy of recognizance, with such certificate of the bail, thereon endorsed, will be sufficient authority to the keeper of said jail, to hold the said prisoner until he is again let to bail or otherwise discharged from custody.

CHAPTER IX.

OF THEIR DUTIES IN COURTS OF SPECIAL SESSIONS.

§ 140. No duty is imposed by law upon sheriffs requiring their attendance upon courts of special sessions, when held by a single magistrate. But where any sheriff has arrested a criminal upon a charge which may be tried before any court of special sessions, and the prisoner shall elect to be tried by such court, the duties of such sheriff, so holding the prisoner, as to bringing him before the court, and detaining him in custody during the trial, are the same as those of any constable, to be hereafter mentioned; while they have the same power as constables in the execution of the judgments of such courts in all cases.

§ 141. Whenever a prisoner is brought by an officer before a magistrate, and is charged with any offence triable by such magistrate, sitting as a court of special sessions, he may elect to be tried by such court, or he may give bail to appear at the next criminal court having

jurisdiction of the offence. If he elects to give bail, he has twenty-four hours after being thereto required, to give such bail.¹

§ 142. During the twenty-four hours allowed such person to give bail, and during the time which shall elapse between the calling any court of special sessions, and the convening of such court, the person charged may be committed to jail for safe keeping, or he shall continue in the custody of the officer arresting him, as the magistrate issuing the warrant of arrest shall direct; and after the court of special sessions shall have convened, the prisoner charged shall be brought before such court, and shall continue in the custody of the officer having him in charge, until the termination of the proceedings of the court.²

§ 143. If the prisoner shall elect to be tried by a jury, the justice composing the court shall issue a venire, directed to any constable of the county, or marshal of the city where the offence is to be tried, commanding him to summon twelve good and lawful men, qualified to serve as jurors, and not exempt from such service by law, and who shall be in no wise of kin either to the complainant or defendant, to be and appear before such court, at a time not more than three days from the date of the venire, and at a place to be named therein, to make a jury for the trial of such offence. The officer to whom such venire shall be delivered, shall execute the same fairly and impartially, and shall not summon any person whom he shall suspect to be biased or prejudiced for or against the defendant. He shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the venire, and return with it to the court. If a sufficient number of competent jurors shall not be drawn, the court may supply the deficiency by directing the constable to summon any of the bystanders or others, who may be competent, and against whom no cause of challenge shall appear, to act as jurors in the case. If the officer to whom the venire shall have been delivered, shall not return the same as thereby required, the court shall issue a new venire, upon which the same proceedings shall be had, as upon the first venire.³

§ 144. The names of the persons so returned, shall be respectively written upon several and distinct pieces of paper, as nearly of one size as may be; and the officer by whom the venire was served, in the presence of the court, shall roll up or fold such pieces of paper, as nearly as may be in the same manner, and put them together, in a box or other convenient thing. The court shall then draw six of such papers, one after another, and if any of the persons whose names shall be so drawn, shall not appear, or appearing, shall be challenged and

¹ 3 R. S. 1002, § 3.

² 3 R. S. 1003, § 5.

³ 3 R. S. 1003, §§ 9, 10, 13, 14.

set aside, then such further number shall be drawn, as will be sufficient to make up the number of six, after all legal causes of challenge shall have been allowed.

§ 145. After hearing the proofs and allegations, the jury shall be kept together in some convenient place, until they agree upon a verdict or are discharged by the court; and a constable or marshal shall be sworn, to attend upon the jury, in like manner as upon trials in justices' courts.

§ 146. Whenever a defendant tried as aforesaid, either by the court or by a jury, shall be convicted, the court shall render judgment thereupon, and inflict such punishment by fine or imprisonment, or both, as the nature of the case may require; but such fine shall in no case exceed fifty dollars, nor such imprisonment six months.¹

§ 147. Whenever a magistrate or jury before whom a criminal cause shall be tried as aforesaid, shall be satisfied, from the evidence and proceedings had before them, that the person or persons charged and tried, were complained of and proceeded against without probable cause, and with malicious intent to injure or harrass, they may render a verdict for costs against the complainant; whereupon the magistrate shall enter judgment for the amount of such costs, upon which an execution may issue against the property or person of such complainant, in the same manner as upon a judgment rendered for tort by a justice of the peace.²

§ 148. The sheriff of the city and county of New York shall execute the judgments and orders of the court of special sessions of the peace of said city and county, by virtue of a warrant under the hand and seal of the first judge, mayor, or recorder, who presided; or of the persons who formed such court.³ And whenever sentence shall be pronounced upon any person convicted of any offence in the court of special sessions in the city and county of New York, the clerk thereof shall, as soon as may be, make out and deliver to the sheriff of the said city and county, or his deputy, a transcript of the entry of such conviction in the minutes of the said court, and of the sentence thereupon, duly certified by the said clerk; which shall be sufficient authority to such sheriff or deputy to execute such sentence, and he shall execute the same accordingly.⁴

§ 149. The judgments and orders of the court of special sessions of the city of Albany shall be executed by the sheriff of the county, or by any constable of the city, to whom a transcript of such judgment or order duly certified by the clerk of said court shall be delivered; and such transcript so certified shall be sufficient authority to such

¹ 3 R. S. 1004, §§ 11, 12, 17, 19.
² 3 R. S. 1005, § 22.

³ 3 R. S. 369, § 2.
⁴ 3 R. S. 370, § 8.

sheriff or other officer to execute such sentence, and he shall execute the same accordingly.

§ 150. The judgment of every court of special sessions, except in the cities of New York and Albany, shall be executed by the sheriff, constables and marshals of the county, or city and county, in which the conviction shall be had, by virtue of a warrant under the hand of the magistrate or magistrates who held the court, or of a majority of them, to be directed to such officers, or to such of them as may be necessary, and specifying the particulars of such judgment.¹ But to authorize any such officer to execute the warrant of commitment of such court, it must be directed to such officer, or to the class of officers to which such officer belongs, and if not, it is void and will afford no protection to a constable or other officer who executes it.²

§ 151. All fines imposed by the court of special sessions of the city and county of Albany, shall be paid to the clerk, or to the sheriff of the said city and county, who shall within ten days after the receipt thereof, pay the same to the chamberlain of the said city, in the same manner and subject to the same penalties for neglect, as provided in respect to fines imposed by courts of general sessions.³ If the defendant be committed by the judgment of any court of special session of any of the other counties of this state, payment of any fine imposed upon such person, shall be made to the sheriff of the county, who shall, within thirty days after the receipt of any such fine pay over the amount received by him to the county treasurer.⁴

§ 152. On a warrant from the court of special sessions in Albany county, against one recognized to appear, but who has failed to do so, the officer to whom it is delivered shall bring the party forthwith before the court, if in session, at the time of such arrest, and if not, to commit him to jail, there to remain till delivered by due course of law.⁵

CHAPTER X.

THEIR DUTIES IN COURTS OF RECORD. ^a

§ 153. Sheriffs are officers of the courts of record held in their respective counties; and it is their duty to attend in person, the sit-

¹ 3 R. S. 372, § 22.

² 3 R. S. 1010, § 60.

³ 6 Barb. 654, *Russell v. Hubbard*.

⁴ 3 R. S. 372, § 23.

⁵ 3 R. S. 1011, § 62.

⁶ 3 R. S. 372, § 27.

^a Ala.—R. C. 1867, §§ 704, 734, 759, 760, 3483, 3938.

Del.—R. S. 1852, p. 89.

Ga.—Code pp. 54, 74.

Ind.—2 R. S. 1852, pp. 4, 10, 20.

Ia.—Rev. 1860, p. 64.

Mass.—St. 1860, p. 150.

Mich.—St. 1857, pp. 987, 1008.

Miss.—Rev. Code 428 484, 543.

N. J.—Dig. 1855, p. 781.

R. I.—R. S. 416.

tings of every such court. It is also their duty, in case of neglect on the part of the board of supervisors so to do, to provide, under the order thereof, every court of appeals held in their county, supreme court, circuit court, and court of oyer and terminer, proper and convenient rooms for the holding such courts, (and in the case of the court of appeals, with a room for the consultation of the judges,¹) and also with furniture, attendants, fuel, lights and stationery, suitable and convenient for the transaction of its business. The expense incurred by them in carrying out such order of any court is made a county charge.² The foregoing provisions of the twenty-eighth section of the code are made applicable to the court of common pleas, and the superior and marine court of the city and county of New York; but it is declared that the said courts shall appoint the officers necessary to attend said courts, whose salaries shall be fixed by the board of supervisors.³ And in case of failure of the supervisors of Erie county to provide and furnish rooms for holding the superior court in the city of Buffalo, and for the clerk thereof, said court may, by order, direct such person or persons as shall be named in such order, to provide such rooms and furniture at the expense of the county.⁴

§ 154. It is also made the duty of every sheriff to summon two constables to attend with him, every term of the court of appeals, and of the supreme court held in his county;⁵ and also within a reasonable time before the sitting of any circuit court, sittings, court of oyer and terminer, county court or court of sessions, and the city court of Brooklyn,⁶ so many constables and marshals as the presiding judge shall direct, and in case of his failure to do so, the sheriff shall summon so many as he may deem necessary. Every marshal or constable so summoned, shall attend the sittings of such court upon pain of being fined for every day's neglect, a sum not exceeding five dollars.⁷ If more assistance is necessary to discharge the duties imposed upon such persons, the sheriff may, under the order of the court, provide it.

§ 155. It is the duty of the sheriff to maintain order in every such court, during the sitting thereof, and to obey the orders and direction of the court, and to execute its orders and process. It is his duty also to see that the constables, marshals, and other persons he may have summoned or employed to attend said court, discharge their respective duties promptly and properly.

¹ Code, § 15.

² Code §§ 28, 51.

³ 3 R. S. 493, § 39.

⁴ 3 R. S. 338, § 132.

⁵ 3 R. S. 278, § 4.

⁶ 3 R. S. 350, § 14.

⁷ 3 R. S. 479, §§ 70-73.

§ 156. The sheriff shall receive no compensation for attending the court of appeals or the supreme court; but he is entitled to the same compensation for attending the city court of the city of Brooklyn as constables.¹

§ 157. The district attorney of every county, at least twenty days before the time appointed for holding any court of oyer and terminer and jail delivery, in his county, shall issue a precept to be tested and sealed, in the same manner as process issued out of the court of oyer and terminer and jail delivery, and to be directed to the sheriff of his county.² Every such precept shall mention the time and place at which such court is held, and shall command the said sheriff,

1. To summon the several persons who shall have been drawn in his county, pursuant to law, to serve as grand and petit jurors at the said court, to appear thereat;

2. To bring before the said court, all prisoners then being in the jail of said county, together with all process and proceedings any way concerning them in his hands as such sheriff;

3. To make proclamation in the manner prescribed by law, notifying all persons bound to appear at the said court, by recognizance or otherwise, to appear thereat; and requiring all justices of the peace, coroners, and other officers who have taken any recognizance for the appearance of any person at such court, or who have taken any inquisition, or the examination of any prisoner or witness, to return such recognizance, inquisition and examination to the said court, at the opening thereof, on the day of sittings.³

And the sheriff to whom any such precept shall be directed and delivered, immediately on the receipt thereof, shall cause proclamation in conformity thereto, signed by him, to be published once in each week, until the sitting of the court, in one or more of the newspapers printed in the said county, and the expense thereof is made a county charge.⁴ The supreme court, in one district, has held that the precept should be issued and returned and filed with the clerk of the county to give validity to the action of the grand jury, and to sustain a conviction by the petit jury. In the same court in another district it is held that the requirement is directory merely and that an omission to issue it, inasmuch as it does not lead to the prejudice of the defendant, will not invalidate the subsequent proceeding or judgment.⁵

§ 158. It shall be the duty of the keeper of every country prison, to present to every court of oyer and terminer, and to every court of

¹ 3 R. S. 350, § 14.

² 3 R. S. 298, § 22.

³ 3 R. S. 298, § 23.

⁴ 3 R. S. 298, § 24.

⁵ 2 Park. Cr. R. 148, *McGuire v. The People*; 3 Park. Cr. R. 272, *McCann v. The People*; 48 Barb. 17, *Ferris v. The People*.

sessions to be held in this county, at the opening of such court, a calendar stating,

1. The name of every prisoner then detained in such prison ;
2. The time when such prisoner was committed ; and by virtue of what process or precept ; and
3. The cause of the detention of every such person ;¹
4. And to every court of sessions, on the first day of its meeting, next after the commitment of any disorderly person, a list of the persons so committed and then in his custody, with the nature of their offences, the name of the justice committing them, and the time of imprisonment ;²
5. And also in like manner to every such last mentioned court, the names of all persons committed to and then in jail for want of sureties to keep the peace.

§ 159. No grand juror, constable, district attorney, clerk, or judge of any court, shall disclose the fact of any indictment having been found against any person for a felony, who is not in actual confinement, until he shall have been arrested, and every person violating this provision shall be deemed guilty of a misdemeanor. But this does not extend to any district attorney, sheriff or other officer, making any such disclosure by the issuing, or in the execution of any process on such indictment, or in any other way when it shall become necessary in the discharge of any official duty.³

§ 160. Within twenty days after the adjournment of any criminal court of record, the sheriff of the county in which such court shall have been held, respectively, shall report by mail to the secretary of state, the name, occupation, age, sex and native country of every person convicted at such court, of any offence, the degree of instruction which each person so convicted has received, and all such other items of information in relation to such convicts, and their offences, as the secretary of state shall require ; which reports shall be made in such form as the said secretary shall prescribe. And to enable such sheriff to make such returns, they shall be authorized by themselves and their deputies, to make all necessary inquiries of the persons convicted, before or after trial, and of the keepers of prisons where such convicts may be confined, and of all other persons. And the sheriffs of the counties of Albany, Cayuga, Chemung, Columbia, Dutchess, Erie, Kings, Monroe, New York, Niagara, Oneida, Onondaga, Orange, Oswego, Rensselaer and Schenectady, shall on the first day of every month transmit to the secretary of state a statement of the

¹ 3 R. S. 1066, § 25.

² 3 R. S. 1018, §§ 39, 40.

³ 2 R. S. 904, § 7.

number of persons convicted in courts of special sessions during the preceding month in the respective cities of Albany, Auburn, Elmira, Brooklyn, Buffalo, Hudson, Lockport, New York, Newburgh, Oswego, Rochester, Poughkeepsie, Syracuse, Schenectady, Troy and Utica. Such statement shall specify the crimes, the whole number convicted, sex, age, nativity, married or single, degree of education, religious instruction, parents living or dead, whether before convicted of any crime and whether temperate or intemperate. All courts in the city of New York having jurisdiction in cases where criminal convictions are had, are, for the purposes of this act requiring such report, declared courts of special sessions, whether composed of one or more police magistrates. Whenever any city shall hereafter be erected or incorporated in any county of this state, the sheriff of said county shall perform the same duties and make the same returns in regard to the persons convicted in courts of special sessions in said city, as the sheriffs of the counties named above are required to prepare in regard to the above named cities. Any justice or other judicial officer before whom any person shall have been convicted of a criminal offence, other than in courts of record, shall furnish to the sheriffs of their respective counties all the information they can obtain to enable such sheriffs to comply with the provisions of this act, and shall make such inquiries of the persons convicted before them, and of others, as the secretary of state shall direct. Any sheriff or magistrate who shall neglect or refuse to conform to the above provisions, shall be liable to the penalty of fifty dollars.¹

CHAPTER XI.

DRAWING AND SUMMONING JURORS. ^a

§ 161. It is made the duty of the sheriff to attend in person or by his under sheriff, upon the drawing of every grand or petit jury by the clerk of the county, (except in Kings county where the selection and summoning of jurors is performed by a person to be appointed

¹ Laws 1867, ch. 604, §§ 1, 4, 5, 7.

^a Ala. R. C. 1867, §§ 4062, &c.

Ark.—Dig. 1858, p. 640.

Cal.—Dig. 1860, 510, 1050; Laws 1863, p. 630; Laws 1864, p. 524.

Del.—R. S. 1852, p. 89.

Fa.—Dig. 1847, p. 344; Laws 1868, p. 16.

Ga.—Code 735.

Ia.—Rev. 1860, pp. 475, 790.

Ill.—2 St. 31.

Kan.—Gen. St. 1863, p. 534.

Ky.—2 R. S. 75.

La.—R. S. 293.

Md.—Code 350, 604.

Mass.—St. 1860, p. 679.

Mich.—St. 1857, 1190.

Minn.—Rev. 1866, pp. 512, 514, 636

Miss.—Rev. Code 498, 500.

by the city judge, district attorney, sheriff, surrogate, and justices of the court of sessions of said county,¹) upon receiving from said clerk, three days notice of such drawing.² It is not however absolutely essential to the regularity of the drawing that he should personally attend, for the same may be proceeded with if the other proper officers are present.³

§ 162. When the proper officers shall have appeared, the clerk shall proceed in their presence to draw the jury. He shall conduct such drawing as follows:

1. He shall shake the box containing the names of the jurors returned to him, so as to mix the slips of paper on which such names are written, as much as possible;

2. He shall then publicly draw out of the said box, as many of the said slips of paper containing such names as there shall be jurors required by law, or specially ordered for such court;

3. A minute of the drawing shall be kept by one of the attending officers, in which shall be entered the name contained on every slip of paper so drawn, before any other such slip shall be drawn;

4. If, after drawing the whole number required, the name of any person shall appear to have been drawn who is dead, or become insane, or who has permanently removed from the county, to the knowledge of the clerk or any other attending officer, an entry of such fact shall be made in the minute of the drawing, and the slip of paper containing such name shall be destroyed;

5. Another name shall then be drawn in the place of that contained on the slip of paper so destroyed, which shall be in like manner entered in the minutes of the drawing;

6. The same proceeding shall be had as often as may be necessary, until the whole number of jurors required shall have been drawn;

7. The minute of the drawing shall then be signed by the clerk and the attending officers, and shall be filed in the clerk's office;

8. A list of the names of the persons so drawn, with their additions

¹ 3 R. S. 702, § 43; 31 N. Y. 330, *Kenny v. The People*.

² 3 R. S. 712, §§ 91, 92; 3 R. S. 1013, § 10; Code §§ 24. 32.

³ 3 R. S. 712, §§ 93, 94; 48 Barb. 17, *Ferris v. The People*.

Mo.—Gen. St. 1865. p. 597.

Neb.—R. S. 110.

N. H.—Gen. St. 1867, p. 395.

N. J.—Dig. 1853, p. 331.

N. C.—Rev. Code, 161.

O.—1 R. S. 751.

On.—Gen. L. 380.

Penn.—Dig. 1861, p. 580.

S. C.—Laws 1868, p. 118.

Tenn.—Code, pp. 716. 949.

Vt.—Gen. St. 1863, p. 331.

Va.—Code 1849, 628.

W. Va.—Laws 1863, p. 106.

Wis.—R. S. 657.

and place of residence, and specifying for what court they were drawn, shall be made and certified by the clerk, and the attending officers, and shall be delivered to the sheriff of the county.¹ And on the payment of the fees allowed by law, the clerk and sheriff shall furnish a copy of such list to any person applying therefor.²

9. When the same person shall be drawn as a grand and petit juror to attend the same court, his name shall be omitted from the list of petit jurors and another name shall be drawn from the petit jury box; and after the completion of the drawing of the petit jurors, the name of such person drawn for the grand jury, shall be returned to the petit jury box.³

§ 163. If any person whose duty it shall be to assist at the drawing of any jurors to attend any court, shall designedly put or consent to the putting upon any list of jurors as having been drawn, any name which shall not have been drawn for that purpose in the manner prescribed by law; or shall omit to place on such list, any name that shall have been drawn in the manner prescribed by law; or shall sign or certify any list of jurors as having been drawn, which was not drawn according to law; or shall be guilty of any other unfair, partial or improper conduct in the drawing of any such list of jurors; he shall, upon conviction, be adjudged guilty of a misdemeanor.⁴

§ 164. Jurors drawn for a term of any court shall be summoned at least six days previous to the sitting thereof.⁵ When talesman are summoned, they may be required to attend forthwith, or at such time as the court may direct;⁶ and so of jurors to attend upon any special proceedings; except in the case of a jury to assess the value of land taken for a plank road, when they shall be summoned at least four days before the day specified for their attendance.⁷

§ 165. Jurors for either a regular term of any court, or for any special proceeding before any court or officer, may be summoned by a deputy of the sheriff, as well as the sheriff himself, unless the power is expressly confined to the latter; and the sheriff or his under sheriff, may by writing deputize or authorize persons to summon any jurors except it be in such last mentioned case; and where there are no jurors undrawn, or for any reason no juror can be obtained from the list returned by the sheriff, on the trial of any issue, if the sheriff is a party in such issue, some other person may be appointed by the court, to summon jurors from the bystanders, or other persons.⁸

¹ 3 R. S. 712, § 95; 3 R. S. 1013, §§ 10, 11.

² 3 R. S. 713, § 97.

³ 3 R. S. 1014, § 18.

⁴ 3 R. S. 974, § 18.

⁵ 3 R. S. 713, § 96; Id. 1014, § 12.

⁶ 3 R. S. 1015, § 24.

⁷ 2 R. S. 496, § 82.

⁸ 8 Wend. 47, *The President, &c., of Brooklyn v. Patchin*; Post 169.

§ 166. In summoning a juror the officer should state to him, personally, if he can be found, that he is thereby summoned to serve as a grand or petit juror, as the case may be, at the particular court at which he is required to appear; mentioning the time and place. The precise language which he may use is unimportant, if the fact that he has been so drawn or selected to serve as a juror, and the particular time and place at which he is required to attend, is distinctly stated. If any juror who has been regularly drawn as aforesaid, cannot be found to be personally summoned, the service may be made by leaving a written or printed notice of such drawing, and containing a statement of the time and place where he is to appear, at such person's place of residence, with some person of proper age.¹ Sometimes such notice is delivered to the juror, even when summoned personally, but this is not necessary. The person must be served personally, if he can be found; or by leaving the notice at his place of residence as aforesaid, if he cannot be so found, whether he be exempt from serving upon a jury or not, or has a valid excuse. The summoning a juror who has been drawn or selected to attend before an officer in a special proceeding, shall be made in all respects in the same manner. If the person has not been so drawn, or selected as aforesaid, but is summoned, as a talesman, under the order of the court, or in any special proceedings before an officer, when the sheriff selects the jurors himself, the service must in all cases be personal.

§ 167. It shall not be a good cause of challenge to the panel or array of jurors in any cause, that they were summoned by the sheriff, who was a party, or interested in such cause; or related to either party therein, unless it be alleged in such challenge, and be satisfactorily shown, that some of the jurors drawn were not summoned, and that such omission was intentional.² Nor is it a good ground of challenge that the sheriff had expressed his opinion as to the guilt of the prisoner.³

§ 168. If at any court of oyer and terminer, or court of sessions, there shall not appear at least sixteen persons duly qualified to serve as grand jurors, who shall have been summoned for that purpose; or if the number of grand jurors attending shall be reduced below sixteen, by any of them being discharged, or otherwise, such court may, by an order to be entered in its minutes, direct the sheriff of the county to summon the number of persons necessary to complete the grand jury for such court. And the sheriff shall summon such number of persons accordingly.⁴ And if any offence shall be commit-

¹ 3 R. S. 713, § 3.
² 3 R. S. 718, § 3.

³ 48 Barb. 17, *Ferris v. The People*.
⁴ 3 R. S. 1015, §§ 23, 24.

ted during the sitting of any court of oyer and terminer, or court of sessions, after the grand jury attending such court shall have been discharged, such court may, in its discretion, by order, to be entered in its minutes, direct the sheriff to summon another grand jury. And the sheriff shall accordingly forthwith summon such grand jury from the inhabitants of the county qualified to serve as petit jurors, and shall return the names thereof to the court.¹

§ 169. Whenever a sufficient number of jurors, duly drawn and summoned, do not appear, or cannot be obtained, to form a jury, the court may order the sheriff to summon from the bystanders, or from the county at large, so many persons qualified as petit jurors, as shall be sufficient; and the sheriff shall summon the number so ordered, from among the inhabitants of the county, duly qualified to serve as jurors in the cause, and return the names to the court. And if by reason of there being one or more juries empanelled, or for any other reason, there shall not remain any ballots undrawn; or if, in consequence of jurors being set aside, no juror can be obtained from the list of those returned by the sheriff, for the trial of any issue, the court may, as in other cases, order the sheriff, or if he be a party in such issue, some other person, to be appointed by the court, to summon jurors from the bystanders, or other persons who shall be returned and summoned as in other cases.² Whenever a sufficient number of jurors duly drawn and summoned do not appear, or cannot be obtained to form a jury, the court may order the sheriff to draw, in the presence of the court, from the jury box kept by the clerk for that purpose, the names of so many persons as the court may direct. The court may also, by consent of the parties to any action pending therein, order the sheriff to summon from the bystanders, or from the county at large, so many persons qualified to serve as jurors, as shall be necessary to make the full panel of jurors on the trial of such action. And the sheriff shall forthwith summon the persons so drawn and make return thereof, in the same manner as now provided by law, in cases where persons are summoned as jurors from the bystanders. The statute directing the drawing of jurors by the sheriff as last mentioned, does not apply to courts in the city and county of New York or Kings county.³ It is further provided that any circuit court or court of oyer and terminer may make an order to be entered in its minutes, requiring the clerk to draw and the sheriff to summon such additional number of petit jurors as it shall

3 R. S. 1016, §§ 34, 35.

3 R. S. 718, §§ 120, 121; 3 R. S. 719,
§ 132; Laws 1867, ch. 494.

³ 4 R. S. 649, §§ 2, 3, 4; Laws 1867, ch.
494.

deem necessary, not exceeding thirty-six; and the clerk shall forthwith bring into court the box containing the names of the petit jury, and he shall, in the presence of the court, proceed publicly to draw the number of jurors mentioned in the order; and when the drawing is completed the clerk shall make two lists of the persons drawn, each of which shall be certified by him to be a correct list of the names of the persons so drawn by him, one of which he shall file in his office, and the other he shall deliver to the sheriff. The sheriff shall thereupon proceed to summon the persons named in such list to appear in the court in which the order requiring the attendance of such jurors shall have been made, on a day to be designated, which shall not be less than two days from the date of the entry of the order. All provisions of law relating to the summoning of jurors shall apply to the summoning of the jurors so drawn and summoned.¹

§ 170. In the city of New York, new panels of jurors may be ordered by the courts held therein, and the county clerk shall draw the same, and deliver a list of the names drawn, to the sheriff, in the same manner as provided for other juries; and the sheriff shall summon such jurors in the same manner as the first jury drawn, and shall, in like manner, return the names of those summoned, to the court.²

§ 171. Whenever a foreign jury shall be ordered by any court, a venire for that purpose shall issue to the sheriff of the proper county, who shall give notice of the same to the clerk thereof, at least twenty days before the return of such venire, when such clerk shall draw the names of twenty-four persons from the lists returned to him by the town officers, in the same manner as in the case of ordinary juries, and shall deliver a list of the names so drawn to such sheriff, who shall summon them as in other cases.³

§ 172. When the selection of jurors is left to the discretion of the sheriff, he should be careful that the person or persons selected by him have the necessary legal qualifications, and that they are not exempt from serving upon juries. He should select those only who are in nowise of kin to the parties, however remote; and no one who is interested in the proceedings, or who he has reason to believe is biased or prejudiced for or against either of the parties; or who has given an opinion upon the subject in controversy, and he should not permit either of the parties, or any other person, to name any juror. But after summoning one to serve as a juror in any case, whether he is exempt from service, or has a valid excuse for not serv

¹ Laws 1870, ch. 489.

² 3 R. S. 716, §§ 109, 110.

³ 3 R. S. 693, §§ 2, 3.

ing, the sheriff cannot, on hearing that fact, release him and summon another in his place, for the court or officer before whom such person is summoned to appear, can alone discharge him.

§ 173. Jurors must be possessed of the following qualifications :

1. They must be males ;
2. Of the age of twenty-one years or upwards, and under sixty years old ;
3. And be at the time, assessed for personal property belonging to them in their own right, to the amount of two hundred and fifty dollars, or shall have a freehold estate in real property in the county, belonging to them in their own right, or in the right of their wives, to the value of one hundred and fifty dollars.¹ But this property qualification shall not be necessary in the case of any person residing in either of the counties of Niagara, Erie, Chautauque, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence, Steuben and Franklin, if he shall be qualified in all other respects, and shall have been assessed on the last assessment roll of the town, for land in his possession, which he has under contract for the purchase thereof, upon which improvements shall have been made to the value of one hundred and fifty dollars, and shall own such improvements.² And every person residing on the New Stockbridge tract, in the towns of Vernon and Augusta, in the county of Oneida, and Lenox and Smithfield, in the county of Madison, who shall be in possession of lands under a contract for the purchase thereof, and shall be worth one hundred and fifty dollars in personal property, or shall have made improvements upon such lands to that amount, shall, if otherwise qualified according to law, be qualified to serve as a juror in any court holden before any justice of the peace within the town where such person resides.³ And it shall not be necessary as a qualification for any juror in the city of New York, that he shall actually be assessed in the said city, but all persons residing in said city who shall be qualified to serve as jurors, and not exempted by any of the laws of this state, shall be selected as such, whether they have been assessed or not ;⁴

4. In the possession of their natural faculties, and not infirm or decrepit ;

5. Free from all legal exceptions, (that is, not an alien⁵ nor ever convicted of any infamous crime,) of fair character, of approved integrity, sound mind and well informed⁶.

¹ 3 R. S. 695, § 5.

² 3 R. S. 695, § 6.

³ 3 R. S. 695, § 6.

⁴ 3 R. S. 697, § 14.

⁵ 6 John. 332, *Borst v. Beecker* ; 3 Bl Com. 362 ; 3 R. S. 6, § 29.

⁶ 3 R. S. 695, § 5.

§ 174. In all cases, except in that of a foreign jury, the jurors must be residents of the county, in which the court or proceeding whereat they are required to serve is held; and in justice's court, they must be residents of the same town where the justice who issues the venire resides,¹ unless the action be between two towns, when the jurors shall be summoned from the county at large,² but not from either of the towns.³ And when a jury is drawn to assess damages in a highway case in any town, they must be drawn and summoned from an adjoining town.⁴

§ 175. No inhabitant of any town, city or county, shall be disqualified as a juror or witness in any cause brought to recover any penalty or forfeiture, on the ground that such penalty or forfeiture is to be applied for the benefit of such town, city or county, or for the benefit of the poor thereof; nor shall any officer, on such ground, be disqualified from serving any process for the summoning a jury in such case.⁵ And on the trial of any action in which the county is interested, the electors and inhabitants of such county are competent as witnesses and jurors.⁶ In penal actions for the recovery of any sum, it shall not be a cause of challenge to the jurors summoned, or to any officer summoning them, that such juror or officer is liable to pay taxes in any town or county, which may be benefitted by such recovery.⁷ And in trials in which a town shall be a party, or be interested, the electors and inhabitants of such town shall be competent witnesses and jurors, but when it is between two towns, no inhabitant of either town shall be a juror.⁸

§ 176. The following persons are exempt from serving on juries:

1. Every person who, on the first day of May, one thousand eight hundred and forty-eight, had been a fireman in any of the cities or villages of this state, for the term of four, five or six years, and who has served as such one year thereafter; and every person, who on the first day of May aforesaid, had been such fireman for a less period of time than four years, and who has served as such for so long a time thereafter as shall make the whole term of his service five years; and every person who may have become such fireman after the passage of the act (April the fifth, one thousand eight hundred and forty-eight,) and has served as such for five years thereafter, shall, during and forever after such service, be exempted from serving as a juror in any of the courts of this state.⁹ And the court shall discharge any person

¹ 3 R. S. 441, § 84.

² 3 R. S. 441, §§ 85, 87.

³ 1 R. S. 837, § 4.

⁴ 2 R. S. 397, §§ 85, 86.

⁵ 3 R. S. 865, § 2.

⁶ 1 R. S. 901, § 4.

⁷ 3 R. S. 718, §§ 124.

⁸ 1 R. S. 837, § 4.

⁹ 3 R. S. 696, § 7.

from serving as a juror when he is a member of any company of firemen, duly organized according to law.¹ But it is provided that in the city of New York no fireman shall be exempted from jury duty, unless he actually performs all the duty of a fireman in his company; and to entitle him to such exemption, he shall produce a certificate of the foreman or other chief officer of his company, that he is a faithful and acting member thereof. This provision however, is not to affect those who are exempt from serving as jurors, by reason of having served as firemen for the period required by law.² The members of a fire company organized for the protection of any cotton, woolen or linen manufactory, while they respectively hold the appointment, shall be exempted from serving as jurors and the certificate of the directors, or their authorized agent, under the seal of said company, shall be evidence of the appointment of such firemen in all cases.³ And so of the members of the fire company organized for the protection of the Auburn prison. They shall be exempt from serving on juries so long as they shall continue such members;⁴

2. Officers and non-commissioned officers, musicians and privates of the National Guard shall be exempt from jury duty during the term they shall perform military duty; every such person who shall have so served seven years, and been honorably discharged shall forever after be exempt from jury duty⁵ as well as those who have become exempt under former laws by reason of service in the militia or military force of the state;⁶

3. Every collector of tolls on the canals, the clerks of each collector, not exceeding two, having the collector's certificate that they are actually employed by him, and all superintendents of repairs, lock tenders, inspectors of boats and weighmasters, while actually engaged in their respective employments on the canals, while the same are navigable;⁷

4. The superintendent, and each of his deputies, and all persons employed in attendance upon any works for the manufacture of coarse salt; and the commission or appointment, in writing, of any such officer or deputy, and the certificate of any owner or agent of any coarse salt manufactory, that any person is employed or engaged in attending upon such manufactory, shall be evidence of the facts stated therein;⁸

5. The keeper of every county or state prison, and all persons

¹ 3 R. S. 713, § 99, sub. 5.

² 3 R. S. 700, § 30.

³ Laws 1815, ch. 202, § 1.

⁴ 3 R. S. 1097, § 153.

⁵ Military Code 1870, § 253.

⁶ 1 R. S. 800, § 152; 4 R. S. 75, § 146.

⁷ 1 R. S. 639, § 348.

⁸ 1 R. S. 680, § 236.

employed in any such prison, shall be exempted during their continuance in office, from serving on juries;¹

6. The keeper of every poor house, alms house or other place provided by any city, town or county, for the reception and support of the poor, shall be exempt from serving on juries;²

7. The resident officers of the state lunatic asylum, and all attendants and assistants actually employed therein, during the time of such employment, shall be exempt from serving on juries; and the certificate of the superintendent shall be evidence of the fact of such employment.³ And the same officers and also all teachers of the state asylum for idiots are likewise exempt;⁴

8. The operators, assistant operators, clerks and other persons in the employ of the different telegraph companies while doing duty in the offices of the company along the route of the telegraph lines :⁵

9. Members of the Metropolitan,⁶ the Capital,⁷ and the Frontier police ⁸

10. Those whose religious faith and practice is to keep Saturday as the Sabbath, shall not be subject to serve as jurors in justices' courts on such day.⁹

§ 177. Certain persons returned as jurors shall be discharged by the court from serving as jurors; and certain others shall be excused from so serving. If any person is drawn to serve as a juror before any court or officer, the sheriff whose duty it is to summon the same, must do so, notwithstanding his right to be discharged or excused; for in such case he has no discretion. But if the sheriff is required to select the jurors himself, he ought not to summon any who he has reason to believe are entitled to be discharged or excused. If however, he does select any such person, he cannot, after hearing his excuse, release him and select another in his place. In such case the court alone can discharge him from serving.

CHAPTER XII.

OF COMPELLING THE ATTENDANCE OF WITNESSES.

§ 178. The service of a subpoena or summons upon a witness, requiring him to appear and testify before any court or officer, whether the process be issued in a civil or criminal cause, matter or proceeding, may be made by the sheriff or by any of his deputies, or by any

¹ 3 R. S. 1100, § 171.

² 2 R. S. 855, § 95.

³ 2 R. S. 887, § 26.

⁴ 4 R. S. 626, § 10.

⁵ 4 R. S. 102, § 1.

⁶ Laws 1864, ch. 403, § 3, 4

⁷ Laws 1865, 554, § 27.

⁸ Laws 1866, ch. 484, § 30.

⁹ Laws 1847, ch. 349.

marshal, coroner or constable, or by any private citizen, whether he be a party to the proceeding or not. And whenever it shall be necessary to send subpoenas into a foreign county for witnesses on criminal process, the district attorney is empowered to send them to the sheriff of the county in which said witnesses reside, whose duty it shall be to serve the same, and make his return without delay to such district attorney.¹

§ 179. A subpoena or summons may be served in any place in the state, whether it be in the county where issued or elsewhere; and in the day time or at night, but not upon Sunday.² The officer or person seeking to make such service, may enter the dwelling of the witness peacefully if he can, for that purpose, but not against the occupant's known wishes; and in no case, whether in a criminal or civil cause, can doors be broken open to enter and make the service.³

§ 180. The manner of serving a subpoena issued out of any court to compel the attendance of any witness, or of a summons of a judge or officer for the like purpose, is

1. By exhibiting to the party to be served, such original subpoena or summons;

2. By delivering to him a copy thereof, or a ticket containing the substance thereof; and

3. By paying, or tendering to him, the fees allowed by law for travelling to and returning from the place where he is required to attend, and the fees allowed by law for one day's attendance thereat.⁴

§ 181. The manner of service of a subpoena in a criminal case, issued out of a court of record, is the same as in a civil suit or proceeding; that is, by showing to the witness the original subpoena, and at the same time delivering to him a copy thereof, or a ticket containing the substance thereof.⁵ Witnesses in criminal cases, however, are entitled to no fees, whether they are subpoenaed to testify in behalf of the people or of the prisoner.⁶

§ 182. The proof of service of a subpoena, whether such service is made by an officer or by a private citizen, is usually by affidavit, but the certificate of a proper officer of the due service thereof, will be sufficient.

§ 183. Whenever any person who shall have been duly subpoenaed to appear at a circuit court,⁷ or at a court of sessions or court of oyer

¹ 3 R. S. 1021, § 67.

² 2 R. S. 935, § 65.

³ 8 How. 435, *Hager v. Danforth*; S. C. 20 Barb. 16.

⁴ 3 R. S. 683, § 56 and 684, § 58.

⁵ 2 Denio 26, *Supervisors of Onondaga*

Co. v. Briggs; 18 Wend. 538, *The Supervisors of Sullivan Co. v. Dimick*; 3 R. S. 1027, § 16.

⁶ 3 R. S. 1021, § 69.

⁷ 3 R. S. 854, § 34.

and terminer;¹ or who has been recognized so to appear at any court of sessions or court of oyer and terminer,² to testify in any cause to be tried therein, shall neglect or refuse to attend, in pursuance of such writ or recognizance, the justice or judge holding the circuit court, sessions or oyer and terminer, shall have power to award an attachment against such person, and to proceed thereon to punish such misconduct, as in other cases of contempt.³ The writ of attachment may be tested on the day when issued, in the name of the presiding judge, and be returnable before the court from which the same issues,⁴ and the allowance of such writ shall be indorsed thereon, by the judge awarding the same.⁵

§ 184. The officer to whom such attachment is directed and delivered, shall execute the same, by arresting and keeping the defendant in his custody, by bringing him personally before the court on the return day thereof, and by detaining him in such custody until discharged by the order of the court. But the inability from sickness or otherwise, of such person, to attend such court, personally, shall be a sufficient excuse for not bringing him before such court. Nor shall any such officer be required, in any case, to confine any person arrested upon an attachment, in any prison, or otherwise restrain him of his personal liberty, except so far as shall be necessary to secure his personal attendance.⁶ Though the attachment is in the nature of criminal process, it is not such criminal process as will authorize its execution upon Sunday; nor will it authorize the breaking open doors to come at the party to arrest him. The powers of the officer under the writ, would seem to be analogous to those he may exercise upon the arrest of a defendant upon civil process, with this difference, that the attachment, unlike civil process, may be executed by the sheriff out of the bounds of his county as well as within it.

§ 185. There is no provision of law, which points out in terms, the officer to whom a writ of attachment issued against a defaulting witness by any circuit court, court of sessions, or a court of oyer and terminer, shall be directed and delivered for execution. The universal practice with those best qualified to determine the correctness of the course, has been to issue such attachment to the officer of the court in attendance, the sheriff of the county, who executes it, like criminal process, in whatsoever part of the state the delinquent may be found. This is certainly the most convenient, practical and expedi-

¹ 3 R. S. 1021, § 68.

² 3 R. S. 1030, § 34.

³ 3 R. S. 854, § 34. The Assembly claims exemption for its members, while it is in session, from arrest on attachment for not obeying a subpoena

in a criminal cause, 55 Barb. 625, In the matter of Hon. Platt Potter and Winsor B. French.

⁴ Laws 1847, ch. 280, § 57.

⁵ 3 R. S. 854, § 35.

⁶ 3 R. S. 855, §§ 36, 37.

tious mode of compelling the attendance of a witness, who may, at the time be in another county, while there is nothing in the statute prohibiting such course; for certainly the provisions of the statute regulating the issuing of attachments against defaulting witnesses, before any judge or officer, has no application to attachments issued by courts of record.

§ 186. In case of the failure of any witness to attend, pursuant to a summons, before any judge or officer, to give testimony, or to have his deposition taken, or before any persons named in any commission, issued by a court of any other state or country, to take testimony, the judge or officer issuing the summons, upon due proof of the service thereof, and of the failure of such witness, shall issue his warrant to apprehend such witness and bring him before such judge or officer, to be examined, or bring him before any persons named in a commission issued by a court of any other state or country, to take testimony for the like purpose.¹ Every warrant to apprehend any witness in the cases aforesaid, shall be directed to the sheriff of the county where such witness may be, and shall be executed by him in the same manner as process issued by courts of record.²

§ 187. If any witness attending before any judge, officer or commissioner, pursuant to a summons, or brought before them, or either of them, shall, without reasonable cause, refuse to be examined, or to answer any legal or pertinent question, or to subscribe his deposition after the same has been reduced to writing, the officer issuing such summons, shall, by warrant, commit such witness to the common jail of the county in which he resides, there to remain until he submits to be examined, or to answer, or to subscribe his deposition, as the case may be, or until he is discharged according to law. Every such warrant of commitment shall specify therein particularly the cause of such commitment; and if such commitment be for refusing to answer any question, such question shall be stated in the warrant.³

§ 188. Any witness to a conveyance served with a subpœna issued by any officer authorized to take the acknowledgment or proof of conveyances, except a commissioner of deeds, requiring such witness to appear and testify before such officer touching the execution of such conveyance, who shall without reasonable cause, refuse or neglect to appear, or appearing, shall refuse to answer upon oath, touching the matters aforesaid, shall forfeit to the party injured, one hundred dollars; and may also be committed to prison by the officer who issued such subpœna, there to remain without bail, and without the

¹ 3 R. S. 684, § 60.

² 3 R. S. 684, 61, 62.

³ 3 R. S. 684, § 63.

liberties of the jail, until he shall submit to answer on oath as aforesaid.¹

§ 189. Every such attachment is in the nature of criminal process, and runs in the name of the people of the state of New York, whether the original subpoena was issued in a civil or in a criminal cause or proceeding; and hence, though the sheriff may have been a party to such original action or proceeding, yet he may serve any attachment issued against a defaulting witness therein, whether he was subpoenaed to testify in his behalf, or in the behalf of the other party.

§ 190. A subpoena in a civil case before a justice of the peace, may be served either by a constable, or any other person; and it shall be served by reading the same, or stating the contents to the witness, and by paying or tendering the fees allowed by law for one day's attendance of such witness.²

§ 191. Whenever it shall appear to the satisfaction of the justice, by proof made before him, that any person duly subpoenaed to appear before him in any cause, shall have refused or neglected, without just cause, to attend as a witness in conformity to such subpoena, (which proof may be by the affidavit of the party in the suit applying for the attachment, or by other competent testimony to the satisfaction of the justice,) and the party in whose behalf such witness shall have been subpoenaed, shall make oath that the testimony of such witness is material, the justice shall have power to issue an attachment to compel the attendance of such witness.³ Every such attachment shall be executed in the same manner as a warrant, and the fees of the officer for issuing and serving the same, shall be paid by the person against whom the same shall have been issued, unless he shall show reasonable cause to the satisfaction of the justice, for his omission to attend; in which case, the party requiring such attachment shall pay all the costs of such attachment, and the service of the same.⁴

§ 192. When a commission issued by a justice of the peace to take the testimony of a witness in a cause pending before such justice, is executed in this state, the commissioner shall have the same power to issue subpoenas, swear witnesses, and compel their attendance, as justices of the peace have.⁵

§ 193. When a witness attending before a justice, in any cause, shall refuse to be sworn, in any form prescribed by law, or to answer any pertinent and proper question; and the party at whose instance

¹ 3 R. S. 54, §§ 37, 38.

² 3 R. S. 439, § 72.

³ 3 R. S. 439, § 73.

⁴ 3 R. S. 439, § 74.

⁵ 3 R. S. 456, § 173.

he attended shall make oath that the testimony of such witness is so far material, that without it he cannot safely proceed to trial, such justice may, by warrant, commit such witness to the jail of the county. Such warrant shall specify the cause for which it was issued, and if it be for refusing to answer any question, such question shall be specified therein; and the witness shall be closely confined pursuant to such warrant, until he subunit to be sworn, or to answer, as the case may be.¹

§ 194. Every person duly subpoenaed as a witness before a justice of the peace, who shall not appear, or appearing shall refuse to testify, shall forfeit for the use of the poor of the town for such non-appearance or refusal (unless some reasonable cause or excuse shall be shown on his oath or the oath of some other person,) such fine, not less than sixty-two and a half cents, nor more than ten dollars, as the justice before whom the prosecution therefor shall be had, shall think reasonable to impose. And such fine may be imposed by the justice, if the witness be present and have an opportunity of being heard against the imposition thereof. The justice imposing any fine shall make up and enter in his docket a minute of the conviction, and of the cause thereof, and the same shall be deemed a judgment in all respects, at the suit of the overseers of the poor of the town. Upon the imposition of such fine, and in default of payment thereof, with costs, the justice shall forthwith issue an execution to any constable of the county directing him to levy such fine, with costs, of the goods and chattels of the delinquent, and for want thereof to convey him to the jail of the county, there to remain until he shall pay such fine and costs; and the keeper of such jail is required to keep such delinquent in close custody, in such jail, until the fine and costs be paid; but such imprisonment shall not exceed thirty days. When the money shall be collected on such execution, the constable shall return the same to the justice, and such justice shall pay over the amount of the fine imposed to the overseers of the poor of the town for the use of the poor.²

§ 195. If any person who has been duly summoned to appear before any justice of the peace to testify in any suit pending in another state, shall refuse or neglect to appear at the time and place mentioned in the summons; or if, on his appearance, he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offence on the trial of a suit in a justice's court.³

¹ 3 R. S. 461, §§ 204, 205.

³ 3 R. S. 681, § 44.

² 3 R. S. 439, §§ 75, 76, 77, 78, 79.

25 N. Y. 588, *Robbins v. Gorham*.

§ 196. A subpoena issued by a coroner to compel the attendance of witnesses upon an inquest,¹ or by a magistrate upon the examination of one charged with crimes; or by a court of special sessions, or by a justice or alderman, returnable before a court of special sessions, or by a justice or alderman, returnable before a court of sessions,² may be served in the like manner as a subpoena issued by a justice of the peace in a civil cause; that is, by reading the same to the witness, or stating the contents thereof to him; but no fee need be paid in any such case to such witness.³ And any witness subpoenaed in any such case, who shall fail to appear, shall be liable to the same penalties and may be proceeded against in the same manner as is provided by law in respect to witnesses in courts of justices of the peace.⁴

§ 197. Whenever any magistrate shall issue any subpoena in any criminal proceeding or trial, he shall indorse upon the back thereof a memorandum showing whether the same was issued for the people or for the prisoner; and every officer or other person who shall insert the names of witnesses in a subpoena issued for the people, intended for the prisoner, with intent thereby to deceive any person, or to obtain any pay as for services in subpoenaing witnesses for the people, shall be deemed guilty of a misdemeanor.⁵

§ 198. The summons issued by a county judge, or by the mayor or recorder of any city, upon the application of any one who contests the election of any member of the senate or assembly, or to support such election so contested, shall be served, by delivering a copy thereof to each witness named therein, a reasonable time before the day on which the attendance of such witness is required; and by paying to such witness the sum allowed to witnesses in civil suits in courts of record.⁶

§ 199. Either of the canal commissioners, or appraisers of damages, may issue subpoenas to compel the attendance of witnesses before the board of appraisers to give testimony in relation to any matter depending before such board.⁷ Such subpoenas may be served in the same manner as a subpoena in a civil suit before a justice of the peace. The witness will be entitled to no fees until he shall have appeared in pursuance of the subpoena, when he shall receive the same fees as are allowed to witnesses for attending courts of record in civil suits, to be paid by the claimants for damages, if subpoenaed on their part, or by the canal commissioners, if subpoenaed on the part of the state.⁸

¹ 3 R. S. 1036, § 3.

² 3 R. S. 1011, § 64.

³ 3 R. S. 1021, 69; 12 Wend. 273, Superintendents of Poor of Ontario Co. v. Moore.

⁴ 3 R. S. 1011, §§ 64, 65; 3 R. R. 1036, § 4.

⁵ 3 R. S. 998, § 40.

⁶ 1 R. S. 463, §§ 13, 14.

⁷ 1 R. S. 598, § 114.

⁸ 1 R. S. 589, §§ 115, 116, 117.

§ 200. The canal board may require the attendance of witnesses before them on the part of the state, if in their opinion, the interests of the state require it; and for that purpose they may issue subpoenas to be signed by their president for the time being, which shall be served by any sheriff or constable by said board thereunto required; who shall be paid such sum therefor, by the canal commissioners, or the commissioners of the canal fund as may be deemed just and reasonable for such service.¹ No mode of serving such subpoena is pointed out; but the practice is to read or state the contents of such subpoena to the witness. The witness is not entitled to any fee until he shall have attended.

§ 201. Every court of record shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court, any prisoner who may be detained in jail or prison within this state, for any cause except a sentence of felony, to be examined as a witness in such suit or proceeding, in behalf of the party making the application.² Such writ may also be issued by any justice of the supreme court, or any officer authorized to perform the duties of such justice, upon the like application of a party to any suit or proceeding pending in a court of record, or pending before any officer or body who may be authorized to examine witnesses in any suit or proceeding.³ Such writ may also be issued by any of the officers aforesaid, upon the application of a party to a suit before any justice of the peace, to bring any prisoner confined in the jail of the same county, or the county next adjoining that where such justice may reside, before such justice, to be examined as a witness.⁴ And so it may be allowed by any referee or commissioner under the statute concerning proceedings to discover the death of persons upon whose lives particular estates may depend, when any such person is in prison, or is kept or detained by any other.⁵

§ 202. Whenever any convict confined in any county or state prison, shall be considered an important witness in behalf of the people of this state upon any criminal prosecution against any other convict by the district attorney conducting the same, it shall be the duty of any officer authorized to allow writs of habeas corpus, upon the affidavit of said district attorney, to grant a writ of habeas corpus for the purpose of bringing such prisoner before the proper court to testify upon such prosecution.⁶ And whenever it shall appear to the court in which

¹ 1 R. R. 603, §§ 147, 148.

² 3 R. S. 876, § 1.

³ 3 R. S. 876, § 3.

⁴ 3 R. S. 877, § 4; 7 Wend. 132, *Martin*

v. *Wood*.

⁵ 3 R. S. 630, §§ 6, 7.

⁶ 3 R. S. 1100, § 173.

an indictment is pending, and to be tried against any person for any offence committed by him while imprisoned in any county prison, or any one of the state prisons, on the person of any other person confined in such jail or state prison, that any other person confined in any county prison, or in any of the state prisons, is an important witness in behalf of the person so indicted, such court is authorized to grant a writ of habeas corpus, for the purpose of bringing such prisoner before such court to testify upon the trial of such indictment, in behalf of the person making the application.¹

§ 203. No sheriff, coroner, constable or marshal, shall be required to obey any writ of habeas corpus unless the party serving the same shall tender to such officer the fees allowed by law for bringing up such prisoner; nor unless he shall also give a bond to such officer having the prisoner in charge, in a penalty double the amount of the sum for which such prisoner may be detained, if he be detained for any specific sum of money, and if not, then in the penalty of one thousand dollars, conditioned that such person will pay the charges of carrying back such prisoner if he shall be remanded, and that such prisoner will not escape by the way, either in going to, or returning from the place to which he is to be taken. But no such payment of fees or bond shall be necessary in any case where the writ is sued out by the attorney general, or by any district attorney.²

§ 204. Whenever any writ of habeas corpus shall be issued in any such case, and the fees have been paid or tendered, and a sufficient bond has been given, it shall be the duty of the officer to whom such writ shall be delivered, to obey and return the same according to the command thereof, in the manner and in the time prescribed by law; and every officer who shall refuse or neglect, so to do, shall forfeit to the people of this state, where the writ was issued upon the application of the attorney general or district attorney, and in other cases, to the party upon whose application the same shall have issued, the sum of five hundred dollars.³ If the writ be issued by a court or officer of competent authority, and is not void upon its face, the officer will be bound to obey it.⁴ The officer shall not only bring the prisoner up according to the command of the writ, but he should also make return to the writ showing by what authority he holds him.

§ 205. When the officer shall have brought up a prisoner in any case to testify, it will be his duty to keep him in his custody, notwithstanding he may have received any bond to indemnify him against any

¹ 3 R. S. 1101, § 178.

² 3 R. S. 893, §§ 94, 95.

3 R. S. 878, § 16.

⁴ 5 John. 357, *Noble v. Smith*; 5 Cow. 176, *Wattles v. Marsh*

escape; and the sheriff cannot allow him to go elsewhere; and when he is not wanted he must take him back to jail and bring him up again the next day if required, unless the jail be distant.¹

§ 206. Whenever any person shall be in execution on any civil process, or committed on any criminal charge, and a habeas corpus shall be issued to bring up the body of such prisoner before any court to testify, or to answer for any contempt or any other matter, and it be returned upon the writ, that the prisoner is charged in the execution, or committed as aforesaid, he shall be remanded after having testified; and if any order or commitment be made against such prisoner, he shall be committed to the prison from which he was taken.²

§ 207. When it shall be necessary for any purpose, to bring any prisoner confined in a county jail, before any court of oyer and terminer, or any court of sessions, which may be sitting in such county, such court may by order, and without issuing any writ of habeas corpus, or other process, direct such prisoner to be brought before them accordingly.³ This provision applies to prisoners confined upon criminal process, and not upon process in a civil action.

CHAPTER XIII.

THEIR DUTIES AS KEEPERS OF THE JAILS. ^a

§ 208. The common jails in the several counties of this state shall be kept by the sheriffs of the counties in which they are respectively situated, and shall be used as follows:

1. For the detention of persons duly committed, in order to secure their attendance as witnesses in any criminal case;
2. For the detention of persons charged with crime, and committed for trial;
3. For the confinement of persons duly committed, for any contempt, or upon civil process; and,

¹ 10 Paige 606, *The People ex rel. Backus v. Stone*.

² 3 R. S. 877, § 5.

³ 3 R. S. 1042, § 46.

^a Ala.—R. C. §§ 3784, 3569.

Ark.—Dig. 1858, p. 624.

Cal.—Dig. 1860, p. 589, 678, 681.

Conn.—Rev. 1866, p. 633.

Del.—R. S. 1852, p. 89.

Ga.—Code 401.

Ill.—2 St. 882.

Ia.—Rev. 1860, pp. 65, 853.

Ind.—R. S. 1852, pp. 345, 410.

Kan.—Gen. St. 1868, pp. 278, 529.

La.—R. S. 419.

Me.—R. S. 486.

Mass.—St. 1860, p. 856.

Mich.—St. 1857, pp. 1440, 1456, 1608.

Minn.—Rev. 1866, pp. 127, 161 666, 787.

Miss.—Rev. Code, 125

Mo.—Gen. St. 1865. p. 878.

Neb.—R. S. 1866, pp. 242, 376, 651, 664.

N. H.—Gen. St. 1867, pp. 449, 532.

N. J.—Dig. 1853, pp. 330, 748.

N. C.—Rev. Code, 474, 558.

On.—1 R. S. 745; 2 R. S. 1398.

On.—Gen. L. 757.

Penn.—Dig. 1861, p. 502.

R. I.—R. S. 421, 480, 578.

S. C.—Laws 1868, p. 106.

Tenn.—Code, p. 147.

Vt.—Gen. St. 1863, pp. 89, 306, 701.

Va.—Code 1849, p. 254.

Wis.—R. S. 162, 1019; Laws 1864, p. 529; Laws 1865, p. 62.

4. For the confinement of persons sentenced to imprisonment therein, upon conviction for any offence.¹

§ 209. But the sheriff of the city and county of New York shall have the custody of the jail in that city used for the confinement of persons committed on civil process only, and of the prisoners in the same.²

§ 210. The jail of Kings county is under the control and management of a keeper, appointed by the board of supervisors, instead of the sheriff. But the powers of the sheriff, constables and policemen of said county at all times of taking the prisoners confined in said county jail, to and from said jail when required or authorized so to do by any law, or confining in said jail such prisoners as said sheriff may legally hold by virtue of civil process, remains the same; and the sheriff shall have the exclusive custody of a suitable portion of the said jail, to be assigned by the board of supervisors for that purpose.³ The penitentiary of Onondaga county shall be used for all the purposes of a jail of such county, and the superintendent thereof shall be the jailer thereof, and shall have the custody and control of all persons confined therein, as the sheriff of said county, were the law relative to said penitentiary not passed. The sheriff of said county shall retain the same control and authority over all prisoners committed to said penitentiary as a county jail, (except such as are liable to be sentenced to said penitentiary,) as he has heretofore had, except while they are confined within the walls of said penitentiary, and he shall have power at all times, to take said prisoners to and from said penitentiary, when required or authorized to do so by law, and shall have one half of the fees for receiving and discharging the said prisoners that he now has; and it shall be the duty of the superintendent of said penitentiary, to keep a true account of all commitments and discharges of such prisoners, and to deliver to said sheriff a copy thereof, certified by him every three months. All general laws now in force regulating the jails of the respective counties of this state, shall, so far as they are consistent with the act aforesaid, be applicable to such penitentiary, in its use as a county jail. If the superintendent shall neglect or refuse to give and file the bond required of him, he shall forfeit the office, and in case of a vacancy in the office of superintendent, the said sheriff, shall have the immediate custody of and control of said penitentiary and the prisoners therein, until another superintendent shall have been appointed and given the bond aforesaid.⁴

¹ 3 R. S. 1061, § 1; 1 R. S. 878, § 170.
² 1 R. S. 878, § 170.

³ 4 R. S. 593, 4, §§ 1, 7.
⁴ Laws 1851, ch. 32.

§ 211. The sheriffs may keep the jails and prisons in their respective counties themselves, or they may appoint keepers of such jails and prisons, for whose acts they shall severally be responsible.¹ The manner of appointment, and the character and duties of jailers have already been briefly pointed out.²

§ 212. The sheriff or his jailer is bound to have sufficient force to prevent a breach of the prison, for nothing but the act of God, or an accidental fire in the jail, or the act of the public enemies, will excuse an escape, after one has been committed to prison. Even breaking the prison by mobs or rebels is not an answer to an action for an escape of a prisoner confined on civil process. On the other hand the jailer must not be guilty of cruelty, or of putting debtors in irons without good cause.³ The killing a prisoner, however, who assaults him when seeking to escape, is justifiable. If a prisoner be confined against his will, with another who has the small pox, and he catches it and dies, it is said that it will be murder in the jailer.⁴

§ 213. It shall be the duty of the keeper of each county prison to provide a Bible for each room in the prison, to be kept therein, and he shall, if practicable, cause divine service to be performed for the benefit of the prisoners, at least once on each Sunday, provided that there shall be a room in the prison that can be safely used for that purpose.⁵

§ 214. No spirituous or fermented liquors shall, on any pretence whatever, be sold within any county prison, or any building used and established as a jail, nor shall any kind of spirituous or fermented liquor, (except cider and that quality of beer called table beer, for prisoners confined on civil process,) be brought into any county prison or jail for the use of any convict or person confined therein, without a written permit, signed by the physician to such prison or jail, specifying the quantity and quality of the liquor which may be furnished to any convict or prisoner, the name of the prisoner for whom, and the time when the same may be furnished; which permit shall be delivered to and kept by the keeper of the prison. No such permit shall be granted, unless it shall satisfactorily appear to such physician, that the liquor is absolutely necessary for the health of the prisoner for whose use it is permitted; which shall be specifically stated in the permit. And every person who shall sell or bring into any prison or jail, any spirituous, fermented or other liquor, contrary to the foregoing provisions, and any sheriff, keeper of a jail, assistant to

¹ R. S. 878, § 170.

Ante ch. 3.

² Watson 43.

⁴ Watson 43.

⁵ 3 R. S. 1063, § 13

such keeper, or other officer employed in and about any jail or prison, who shall knowingly suffer any spirituous or other liquor, to be sold or used in a jail, contrary to the foregoing provisions, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be subject to imprisonment, not exceeding one year, or to a fine not exceeding two hundred dollars, or both, in the discretion of the court; and every sheriff or other officer so convicted, shall forfeit his office.¹

§ 215. If in any county there shall not be a jail, or the jail erected shall become unfit or unsafe for the confinement of prisoners, or shall be destroyed by fire or otherwise, the county court of such county shall, by instrument in writing, to be filed with the clerk of the county, designate the jail of some contiguous county, for the confinement of the prisoners of their county, or for the confinement of any one or more of such prisoners, which shall thereupon, to all intents and purposes, except as herein otherwise provided, become the jail of the county for which it shall have been so designated, and for the purposes expressed in such instrument. Such designation may be modified or annulled by the county court of the county, by which the same was made, on the application of the sheriff thereof, by an order to be entered in the minutes of such court. A copy of such instrument of designation, duly certified by the clerk of the county, under his official seal, shall be served on the sheriff and keeper of the jail so designated; whose duty it shall be, from thenceforth to receive into such jail, and there safely keep all persons who may be lawfully confined therein, pursuant to the foregoing provisions. Such sheriff shall be responsible for the safe keeping of the persons so committed to such jail, in the same manner and to the same extent, as if he were sheriff of the county for whose use such jail shall have been designated, and with respect to the persons so committed, shall be deemed the sheriff of such county. Whenever a jail shall be erected for the county for whose use such designation shall have been made, or its jail shall be rendered fit and safe for the confinement of prisoners, the county court of the county, shall by an instrument in writing, to be filed with the clerk of the county, declare that the necessity for such designation has ceased, and that the same is thereby revoked and annulled. And the clerk of the county shall immediately serve a copy of such revocation upon the sheriff thereof, whose duty it shall be to remove the prisoners belonging to his custody, and so confined without his county, to his proper jail.²

§ 216. The sheriffs of any of the counties of this state, in which

¹ 3 R. S. 728, §§ 29, 30, 31; 3 R. S. 1100, * 3 R. S. 726, §§ 14, 15, 16, 17, 21, 22.
§§ 175-177.

there are or shall be established more than one jail, may confine their respective prisoners in either of such jails, and may remove them from one jail to another within the county, whenever such sheriff shall deem it necessary for their safe keeping, or whenever it shall be necessary for their appearance at any court. Whenever, by reason of any jail being on fire, there shall be reason to apprehend that the prisoners confined in such jail may be injured or endangered by such fire, the sheriff or keeper of such jail may, in his discretion, remove such prisoners to some safe and convenient place, and there confine them, so long as may be necessary to avoid such danger; and such removal and confinement shall not be deemed an escape of such prisoners. And whenever any pestilence or contagious disease shall break out in any jail, or in the vicinity of any jail, and the physician to such jail shall certify that such pestilence is likely to endanger the health of the prisoners confined in such jail, the county judge of the county in which such jail is situated, or in the city and county of New York, the mayor or recorder, or any alderman of the city, and in the city and county of Albany, the mayor or recorder, or any alderman of the city of Albany, shall in writing designate some safe and convenient place within such county, or the jail of some contiguous county, as a place of confinement of such prisoners; which designation shall be filed in the office of the clerk of the county; and shall authorize the sheriff to remove such prisoners to the place or jail so designated, and there confine them, until they can be safely returned to the jail from which they were taken. Any place to which the prisoners in any jail shall be removed, pursuant to the preceding provisions, shall, during the time of the confinement of such prisoners therein, be deemed the jail of the county.¹

§ 217. On the application of the sheriff, under sheriff, or district attorney of any county of this state, with the assent of the county judge of such county, the governor may, if in his opinion it shall be necessary and proper, authorize such sheriff, under sheriff, district attorney, or some deputy sheriff to contract with, and organize a guard for the protection of any jail or prison in said county, or to arrest, detain, or have in safe keeping any prisoner or prisoners, or to enforce any process, judgment or decree of any court; which application and authority shall be in writing, and a copy thereof filed and recorded in the office of the secretary of state. The said written authority shall specify the number beyond which the guard shall not extend. The governor may at any time revoke, alter or modify such authority, and

¹ 3 R. S. 727, §§ 24-27; 3 R. S. 1062, § 12.

he may in his discretion, permit such sheriff, under sheriff, or deputy, to contract with any uniform company, or companies, to form such guard. Such guard when so formed, shall be under the command and direction of such officer or officers as shall be designated by the governor, and in case he shall not make such designation, then under the command of the sheriff, under sheriff, or deputy, and of such officer or officers, military or civil, as shall be designated by such sheriff or deputy; and shall be subject to all such rules and regulations for their government and action as shall have been agreed upon at the time of the organization, or afterwards directed by the governor; and the governor may deliver to such guard any amount of ammunition or cartridges that he shall think proper and necessary.¹

§ 218. Whenever the sheriff of any county shall deem it necessary to raise a temporary guard for the protection of a jail or prison, or the safe keeping of prisoners, he may with the assent of the county judge, employ such temporary guard as may be necessary, until a guard can, with reasonable diligence, be formed and organized as prescribed in the preceding section; the expense of which said temporary guard shall be audited, allowed and paid by the board of supervisors of said county, as other county charges; as well as the expenses of the sheriff, or other county officer, incurred in pursuance of any of the provisions of the foregoing and this section.²

§ 219. Every sheriff or jailer upon whom a declaration, notice, or any other proceeding directed to any prisoner in his custody, shall be served, shall, within five days thereafter, deliver the same to such prisoner, with a note thereon of the time of the service thereof upon such sheriff or jailer; and for every neglect or violation of this duty, the sheriff or jailer guilty thereof, shall be liable to such prisoner for all damages occasioned thereby.³

§ 220. If any person in confinement, under indictment, or under sentence of imprisonment, or under a criminal charge, or for want of bail for good behavior, or for keeping the peace, or for appearing as a witness, or in consequence of any summary conviction, or by order of any justice; or any prisoner in a county jail other than those who are committed for contempt or on civil process, shall appear to be insane, the county judge, of the county where he is confined, shall institute careful investigation, call two respectable physicians and other credible witnesses, invite the district attorney to aid in the examination, and if he deems it necessary, call a jury, and for that purpose is fully empowered to compel the attendance of witnesses and jurors; and if it be

¹ 3 R. S. 729, §§ 33-37.

² 3 R. S. 730, §§ 46, 47.

³ 3 R. S. 728, § 32.

satisfactorily proved that the prisoner is insane, said judge may discharge him from imprisonment, and order his safe custody and removal to the asylum, where he shall remain until restored to his right mind; and then if the said judge shall have so directed, the superintendent shall inform the said judge and the county clerk, and district attorney thereof, so that the person so confined, may within sixty days thereafter, be removed to prison, and criminal proceedings be resumed, or otherwise discharged; or if the period of his imprisonment shall have expired, he shall be discharged.¹

§ 221. If a person imprisoned on attachment, or any civil process, or for the nonpayment of a militia fine, become insane, the county judge of the county where he is confined, shall institute like proceeding in his case as are required in the cases provided for in the preceding section; but notice shall in such case be given by mail or otherwise, to the plaintiff or his attorney, if in the state; and if it shall be proved to the satisfaction of said judge that the prisoner is insane, he may discharge him from imprisonment and order him into safe custody, and to be sent to the asylum; nevertheless the creditor may renew his process, and arrest again his debtor when of sane mind.² The order for a discharge must contain a direction that the prisoner be sent to the asylum, or it will be void, and the sheriff if he allows such prisoner to go at large, will be liable for a voluntary escape.³

§ 222. It shall be the duty of the sheriff and keeper of each of the jails and prisons to admit the state prison inspectors, or any one of them, into every part of said jail or prison; to exhibit to them, on demand, all the books, papers, documents, and accounts pertaining to such jail or prison, or to the detentions of persons confined therein; and to render them every other facility in their power to enable them to discharge their duties, and to enable them to obtain any necessary information; the said inspectors shall have power to examine on oath, to be administered by any one of them, any of the keepers or officers of such prison or jails, and any person not under sentence confined therein, and to converse with any of the prisoners so confined, without the presence of the keepers thereof, or any of them.⁴ And the following persons shall also be authorized to visit at pleasure all county and state prisons: The governor and lieutenant governor, secretary of state, comptroller, and attorney general, members of the legislature, judges of the court of appeals, supreme court, and county judges, district attorneys, and every minister of the gospel having charge of

¹ 2 R. S. 893, § 49; 3 R. S. 1063, § 14.

² 2 R. S. 894, § 50.

³ 4 Com. 300. *Bush v. Pettibone*; S. C. 5 Barb. 273.

⁴ 3 R. S. 1064, § 20.

a congregation in the town wherein any such prison is situated. No other person not authorized by law, shall be permitted to enter the rooms of a county prison in which convicts are confined, unless under such regulations as the sheriff of the county shall prescribe.¹

CHAPTER XIV.

THEIR DUTIES AS KEEPERS OF THE JAILS IN CRIMINAL CASES.

§ 223. The keepers of the county prisons shall receive and safely keep every person committed to their custody for safe keeping, examination or trial, or duly sentenced for imprisonment in such prison upon conviction for any contempt or misconduct, or for any criminal offence; and shall not without lawful authority, let out of prison, on bail or otherwise, any such person.²

§ 224. When a prisoner is brought to the jail for commitment, by any officer, other than the sheriff, the keeper of the jail should first examine and ascertain that the process of commitment, which must be delivered to and left with him, is regular upon its face, and is signed by a proper officer. And if the same is in due form, he should then make the necessary examination and inquiries of the prisoner and of the officer who delivers such prisoner into his custody, to enable him to make the entries required by law to be made by him in the jail register, as mentioned in the next section.

§ 225. It shall be the duty of the keeper of each county prison, to keep a daily record of the commitments and discharges of all prisoners delivered to his charge, which record shall exhibit the date of entrance, name, offence, term of sentence, fine, age, sex, country, color, social relations, parents, habits of life, cannot read, read only, read and write, well educated, classically educated, religious instruction, how committed, by whom committed, state of health when committed, how discharged, trade or occupation, whether so employed when arrested, number of previous convictions, value of articles stolen,³ and when discharged, when let to bail or escape, or sentenced to imprisonment in the state prison, and when removed.

§ 226. It shall be the duty of the keepers of said prison to keep the prisoners committed to their charge, as far as may be practicable, separate and distinct from each other, and prevent all conversation between the said prisoners. Male and female prisoners, (except husband and wife,) shall not be kept or put in the same room. And prisoners committed on criminal process, and detained for trial, and

¹ 3 R. S. 1101, § 182.

² 3 R. S. 1063, § 15.

³ R. S. 1062, § 3.

persons committed for contempt, or upon civil process, shall be kept in rooms separate and distinct from those in which persons convicted and under sentence shall be confined; and on no pretence whatever, shall prisoners detained for trial, or persons committed for contempt, or upon civil process, be kept or put in the same room with convicts under sentence.¹ And no person who, by reason of lunacy or otherwise, is furiously mad, or so far disordered in his mind, as to be dangerous if permitted to go at large, and who may be committed as a disorderly person, shall be confined in the same room with any person charged with or convicted of any crime. One committed under the statute against profane swearing, shall be confined in a room separate from all other prisoners.²

§ 227. But prisoners detained for trial, may converse with their counsel and with such other persons as the keeper in his discretion may allow; prisoners under sentence shall not be permitted to hold any conversation with any person, except the keepers or inspectors of the prison, unless in the presence of the keeper or inspector.³

§ 228. Prisoners detained for trial, and those under sentence, shall be provided with a sufficient quantity of inferior but wholesome food, at the expense of the county; but prisoners detained for trial, may, at their own expense, and under the direction of the keeper, be supplied with any proper articles of food.⁴

§ 229. It shall be the duty of the keeper of each county prison to cause each prisoner under sentence, except such as are under sentence of death, to be constantly employed at hard labor when practicable, during every day except Sunday, and it shall be the duty of the county judge or of the inspectors appointed by him, to prescribe the kind of labor at which such prisoner shall be employed, and the keeper shall account at least annually, with the board of supervisors of the county for the proceeds of such labor. The keepers of said prisons shall respectively have power, with the consent of the supervisors of the county, from time to time, to cause such of the convicts under their charge, as are capable of hard labor, to be employed upon any of the public avenues, highways, streets or other works, in the county in which such prisoner shall be confined, or in any of the adjoining counties, upon such terms as may be agreed upon between the said keepers and the officers or other persons under whose direction such convicts shall be placed. Whenever any convicts shall be employed as above, they shall be well chained and secured; and shall

¹ 3 R. S. 1062, §§ 3, 4, 5, 6.

² 2 R. S. 934, § 57.

³ 3 R. S. 1062, § 7.

⁴ 3 R. S. 1062, § 8.

be subject to such regulations as the keeper legally charged with their custody shall from time to time prescribe.¹

§ 230. After the court of oyer and terminer shall commence its sittings in any county, no prisoner detained in the common jail of, any such county upon any criminal charge, shall be removed therefrom by any writ of habeas corpus, unless such writ shall be made returnable before it.²

§ 231. When it shall be necessary for any purpose, to bring any prisoner confined in a county jail, before any court of oyer and terminer, or any court of sessions, which may be sitting in such county, such court may by order, and without issuing any writ of habeas corpus, or other process, direct such prisoner to be brought before them accordingly.³

§ 232. Within twenty-four hours after the discharge of any grand jury, by any court of oyer and terminer, or court of sessions, it shall be the duty of such court to cause every person confined in such prison upon any criminal charge, who shall not have been indicted, to be discharged without bail, unless satisfactory cause shall be shown to such court for detaining such person in custody, or upon bail, as the case may require, until the meeting of the next grand jury in such county.⁴ But persons so in jail, or on recognizance, are not of course entitled to be discharged, although no indictment be found. Their discharge rests in the discretion of the court.⁵

§ 233. Every person discharged from prison, or from his recognizance, in consequence of no indictment being found against him, or in consequence of not being brought to trial, and every person acquitted on trial, shall be discharged without being required to pay any fees.⁶

§ 234. It shall be the duty of every keeper of each county prison, to receive into the prison every person duly committed thereto for any offence against the United States, and to confine such person in the prison until he shall be duly discharged, the United States supporting such person during his confinement. The foregoing provisions relative to the mode of confining prisoners and convicts, shall apply to all persons so committed by any court or officer of the United States.⁷

§ 235. It shall be the duty of the respective keepers of each of the county and state prisons, to receive into the said prisons, and safely

¹ 3 R. S. 1062, §§ 9-11.

² 3 R. S. 1066, §§ 27.

³ 3 R. S. 1042, § 46.

3 R. S. 1066, § 26.

⁵ 2 Com. 82, *Champlain v. The People*.

⁶ 3 R. S. 1042, § 45.

⁷ 3 R. S. 1063, § 16.

keep therein, subject to the discipline of such prison, any criminal convicted of any offence against the United States, sentenced to imprisonment therein, by any court of the United States, sitting within this state, until such sentence be executed, or until such convict shall be discharged by due course of law; the United States supporting such convict, and paying the expenses attendant upon the execution of such sentence.¹

§ 236. In default of the surety required by any justice of the peace of any disorderly person for his good behavior, such justice shall, by warrant under his hand, commit such offender to the common jail of the city and county. Such person may be discharged by any two justices of the peace of the county, upon giving such sureties for good behavior as were originally required from such offender. After the person has been committed to the jail, one justice cannot accept the surety originally required and direct the discharge of the prisoner.²

§ 237. It shall be the duty of the keeper of every jail, to lay before the court of general sessions of the peace, on the first day of its meeting, next after the commitment of any disorderly person, a list of the persons so committed and then in his custody, with the nature of their offences, the name of the justice committing them, and the time of imprisonment. Such court shall inquire into the circumstances of each case, and it may discharge such disorderly person from confinement, either absolutely or upon receiving sureties for his or her good behavior, in its discretion; or the said court may, in its discretion, authorize the binding out of such disorderly persons as shall be minors, in some lawful calling. And it may also, in its discretion, order such disorderly person to be kept in the common jail for any term not exceeding six months, at hard labor; or may direct that during any part of the imprisonment, not exceeding thirty days, such offender shall be kept on bread and water only.³

§ 238. If there be no means provided in such jail for employing offenders at hard labor, the court may direct the keeper thereof to furnish such employment as it shall specify, to such disorderly persons as shall be committed thereto, either by a justice or any other court, and for that purpose, to purchase any necessary raw materials and implements, not exceeding in amount such sum as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them. The expenses incurred in pursuance of such order,

¹ 3 R. S. 1099, § 163.

² 2 R. S. 903, §§ 2, 6; 23 Wend. 47, The

People v. Brown; 5 Barb. 205, The People v. Duffy.

³ 2 R. S. 904, §§ 7-10.

shall be paid to the keeper by the county treasurer, on the production of the order of the county court, and an account of the materials purchased, verified by the oath of the keeper. The keeper shall sell the produce of such labor, and shall account for the first cost of the materials purchased, and for one half of the surplus, to the board of supervisors, and pay the same into the county treasury; and the other half of the surplus shall be paid to the person earning the same, on his or her discharge from imprisonment. The keeper shall account to the court whenever required, for all materials purchased, and for the disposition of the proceeds of the earnings of such offenders.¹

§ 239. No person who, by reason of lunacy or otherwise, is furiously mad, or so far disordered in his mind as to be dangerous, if permitted to go at large, shall be committed as a disorderly person, to any prison, jail or house of correction, or confined therein, unless an agreement shall have been made for that purpose with the keepers thereof, nor in any other way than as herein directed; and no such lunatic or mad person, or person disordered in his senses, shall be confined in the same room with any person charged with or convicted of any crime; nor shall such person be confined in any jail more than ten days, but shall be sent to the lunatic asylum. Any overseer of the poor, constable, keeper of a jail, or other person, who shall confine any such lunatic or mad person in any other manner, or in any other place than such as are herein prescribed, shall be deemed guilty of a misdemeanor, and on conviction shall be liable to a fine not exceeding two hundred and fifty dollars, and to imprisonment not exceeding one year, or both, in the discretion of the court before which the conviction shall be had.²

§ 240. When the reputed father of a bastard is committed to any jail, he shall be confined therein, without being entitled to the liberties thereof.³ But if the woman marry before she is delivered of such child, or if she shall miscarry, so that such child shall not be born alive, or if it shall appear that she is not so pregnant, then the person charged as the father of such child shall be discharged from custody, if imprisoned, by the court of sessions of the county, before which such fact shall appear; or shall be immediately relieved out of custody, by warrant under the hands and seals of the justices by whom he was committed, upon such fact appearing to them.⁴

§ 241. If the mother refuse to disclose the name of the father of such bastard or child, the justice or justices may, after the expiration of one month from the time of delivery, if she shall be sufficiently

¹ 2 R. S. 905, §§ 11-13.

² 2 R. S. 883, §§ 6, 7, 11; 2 R. S. 889, § 35.

³ 2 R. S. 909, § 17.

⁴ 2 R. S. 912, § 30.

recovered, commit her to the common jail of the county, by warrant under his hand, or the hands of such justices, in which the cause of commitment shall be distinctly set forth, there to remain until she shall testify and disclose the name of such father.¹ And so if she be possessed of any property in her own right and refuses or neglects to support the child, she shall be committed to the common jail of the county, by the justices who made the order requiring her to support such child, there to remain, without bail, until she comply with such order, unless she shall execute a bond to the people of this state, in such sum as said justices shall direct, with good and sufficient sureties, to appear at the then next court of sessions, in the said county, and not to depart the said court without its leave.² If the court shall not be satisfied that such woman has property in her own right, it shall discharge her from her bond, and if in custody from her imprisonment.³ If the court affirm such order it shall require said mother to execute a bond, in such sum as it shall prescribe. If she shall refuse or neglect to execute such bond, she shall be committed by order of said court to said jail, there to remain until she shall execute such bond or be discharged by the court.⁴

§ 242. Whenever any person shall be committed to prison charged as the father of a bastard, or of a child likely to be born a bastard, and whenever any mother of a bastard shall be so committed, for their default in not executing a bond to support such child, or to indemnify the public, it shall be the duty of the court of sessions of the county, to inquire from time to time into the circumstances and ability of such father or mother to support such bastard, or to procure sureties to be bound with either of them. If the court shall at any time be satisfied that such father or mother is wholly unable to support such child, or to contribute to its support, or to procure sureties to be bound with either of them, the said court may, in its discretion, order such father and mother to be discharged from such imprisonment. But neither of them when so committed shall be discharged from imprisonment under or by virtue of any insolvent act, or other act for the relief or discharge of imprisoned debtors, or in any other way, until discharged by the court of sessions of the county.⁵

§ 243. Where an apprentice shall refuse to serve according to the terms of his contract or indentures, his master may apply to any justice of the peace of the county, or to the mayor, recorder, or any alderman of the city, where he shall reside, who shall be authorized by warrant

¹ 2 R. S. 910, § 20.

² 2 R. S. 910, § 22.

³ 2 R. S. 913, § 35.

⁴ 2 R. S. 913, § 36.

⁵ 2 R. S. 914, §§ 41, 44.

or otherwise, to send for the person so refusing, and if such refusal be persisted in, to commit such person, by warrant to the bridewell, house of correction, or common jail of the city or county, there to remain until such person will consent to serve according to law. On complaint being made on oath, by any master, touching any misdemeanor or ill behavior of any such person, to any two justices of the peace of the county, or to the mayor, recorder and alderman of any city, or to any two of them, it shall be their duty to cause the person complained of, to be brought before them, and to hear, examine, and determine the complaint. If the complaint appear to be well founded, the officers may by warrant, commit the offender to the house of correction, or to the common jail of the county, for any term not exceeding one month, there to be employed in hard labor, and to be confined in a room with no other person.¹

§ 244. Whenever any recovery shall be had before a justice of the peace, for any penalty or forfeiture incurred by violating any provision contained in the ninth title of the twentieth chapter of the first part of the Revised Statutes, which is entitled “Of excise, and the regulations of taverns and groceries;” or for any penalty or forfeiture incurred by violating any provision contained in the eleventh title of the same chapter, relating to fisheries, execution shall issue thereon immediately, and the justice shall indorse upon such execution, the cause for which such judgment was rendered; and in case no goods or chattels can be found to satisfy such execution, the constable having the same shall commit such defendant to the jail of the county, and shall deliver to the keeper thereof a certified copy of such execution and indorsement; by virtue of which, such keeper shall detain such defendant for a period not exceeding sixty days, without allowing him the benefit of the liberties of such jail.²

§ 245. Whenever a judgment shall be obtained before a justice of the peace for a penalty or forfeiture under the statutes relative to the manufacture of salt, and an execution is issued thereon, and the officer having the execution is unable to make the same out of any property of the defendant, he shall commit the defendant to the jail of the county, where he shall remain confined, within the walls of the jail, without bail, for the term of sixty days, unless he shall sooner pay or satisfy such execution; and every execution so issued, shall contain a clause ordering the defendant to be imprisoned, as above specified, unless property whereon to levy such execution shall be found by the officer to whom the same shall be directed. If at any time, any

¹ 3 R. S. 253, §§ 29-31.

² 3 R. S. 447, § 126.

defendant so committed to jail, shall be found without the walls of the jail, it shall be deemed an escape, and the sheriff shall be liable for the amount due on the execution.¹

§ 246. Whenever a judgment shall be recovered in a court of record for any penalty or forfeiture incurred under the said statutes relative to the manufacture of salt, and an execution thereon against property shall have been returned unsatisfied, in whole or in part, the defendant, upon any execution against his body, shall be imprisoned within the walls of the prison in the manner pointed out in the preceding section, one day for each dollar in the penalty recovered in such cause, and remaining unpaid, without bail, unless he shall sooner satisfy such execution. If at any time any defendant so committed to jail shall be found without the walls of the jail before he is entitled to his discharge, it shall be deemed an escape, and the sheriff shall be liable for the amount due on the execution.²

§ 247. Whenever execution shall be issued upon judgments recovered in actions for penalties for any trespass upon any lands belonging to the people of this state, or upon any Indian lands, and the body of any defendant shall be arrested thereon, he shall be imprisoned according to law, without being entitled to the liberties of the jail.³

§ 248. When any land shall have been sold under execution, and the person against whose property such execution shall have issued, or any person who may be in possession of the premises so sold, shall have violated any order of a justice of the supreme court, or county judge restraining such person from committing waste upon such lands, upon satisfactory proof of such violation, the court or officer shall issue a warrant to the sheriff of the county, reciting such order, and the proof of the violation thereof, and thereby command such sheriff to commit such defendant to close confinement for such term, not more than one year, as shall be deemed expedient; and the sheriff shall execute such warrant accordingly, and shall commit the person named therein, without allowing him the liberties of the jail. But such court or officer so committing such prisoner may release him from confinement at any time, upon receiving a bond with the conditions prescribed in the statute.⁴

§ 249. Every court of record shall have power to punish as for a criminal contempt of such court. Such punishment may be by fine or by imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of the court, but the fine shall in no case exceed the sum of two hundred and fifty dollars, nor the im-

¹ 1 R. S. 681, §§ 242, 243.

² 1 R. S. 681, §§ 244, 245.

³ 1 R. S. 554, § 94.

⁴ 3 R. S. 623, §§ 22, 23, 24.

prisonment thirty days; and where any person shall be committed to prison for the nonpayment of any such fine, he shall be discharged at the expiration of thirty days. Whenever any person shall be committed for any such contempt, the particular circumstances of his offence, shall be set forth in the order or warrant of commitment.¹

§ 250. Every court of record shall have power to punish any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court, may be defeated, impaired, impeded or prejudiced,² by fine and imprisonment, or both, as the nature of the case shall require.³ If an actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him, on the order of the court.⁴ In all other cases the fine shall not exceed two hundred and fifty dollars, over and above the costs and expenses of the proceedings. When the misconduct complained of, consists in the omission to perform some act or duty, which it is yet in the power of the defendant to perform, he shall be imprisoned only, until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings. In such case the order or process of commitment shall specify the act or duty to be performed, and the amount of the fine and expenses to be paid. In all other cases, where no special provision is made by law, if imprisonment be ordered, it shall be for some reasonable time, not exceeding six months, and until the expenses of the proceedings be paid; and also, if a fine be imposed, until such fine be paid; and in the order and process of commitment, the duration of such imprisonment shall be expressed.⁵ But no person shall be imprisoned for the nonpayment of interlocutory costs, or for contempt of court in not paying costs, except attorneys, solicitors and counsellors, and officers of court, when ordered to pay costs for misconduct as such, and witnesses when ordered to pay costs on attachment for nonattendance.⁶

§ 251. If any witness attending before any judge, officer or commissioner, pursuant to a summons, or brought before them, or either of them, shall without reasonable cause, refuse to be examined, or to answer any legal and pertinent question, or to subscribe his deposition after the same has been reduced to writing, the officer issuing such summons, shall, by warrant, commit such witness to the common jail of the county, in which he resides, there to remain until he submits

¹ 3 R. S. 469, §§ 8, 9, 10, 11.

² 3 R. S. 849, § 1; *Id.* 854, §§ 34-36.

³ 3 R. S. 852, § 20

⁴ 3 R. S. 853, § 21.

⁵ 3 R. S. 853, §§ 22-25.

⁶ 3 R. S. 850, § 4.

to be examined, or to answer, or to subscribe his deposition, as the case may be, or until he be discharged according to law. Every such warrant of commitment shall specify therein particularly the cause of such commitment and if such commitment be for refusing to answer any question, such question shall be stated in the warrant. In the case of a witness to a deed who refuses to appear or answer, he may be committed to prison by the officer, there to remain without bail, and without the liberties of the jail until he shall submit to answer on oath.¹

§ 252. Any person brought before an officer or judge under his warrant, issued under the statute concerning the examination of insolvent debtors, who shall refuse to be sworn, or to answer satisfactorily all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such officer, the officer shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn or to answer as required, or to sign such examination; in which warrant the particular default of the person committed shall be specified; and if it be, in not answering any question, such question shall also be specified therein. If any person so committed shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall recommit such person, unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer, on oath, the questions so put to him. And any sheriff or jailer wilfully suffering any person so committed, or recommitted, pursuant to the foregoing provisions to escape, shall be liable to indictment for a misdemeanor; and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.²

§ 253. Punishment as for criminal contempts before justices of the peace, may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding five days, or both, in the discretion of the justice. But no person shall remain imprisoned for the nonpayment of such fine, more than ten days; and the warrant of commitment for any contempt, shall set forth the particular circumstances of the offence, or it shall be void.³

¹ 3 R. S. 684, §§ 61, 62; 3 R. S. 54, § 38. ³ 3 R. S. 460, §§ 200, 203.

² 3 R. S. 117, §§ 14-18.

§ 254. When a witness attending before any justice, in any cause, shall refuse to be sworn, in any form prescribed by law, or to answer any pertinent and proper question, and the party at whose instance he attended, shall make oath that the testimony of such witness is so far material, that without it he cannot safely proceed in the trial of such cause, such justice may by warrant commit such witness to the jail of the county. Such warrant shall specify the cause for which the same is issued, and if it be for refusing to answer any question, such question shall be specified therein; and such witness shall be closely confined pursuant to such warrant, until he submit to be sworn or to answer, as the case may be.¹

§ 255. All sheriffs, jailers and constables, are required to execute any attachment issued by the president of any court martial or of any court of inquiry, for the purpose of procuring the attendance of witnesses, for compelling witnesses to be sworn, and to testify and preserve order. And any person who shall be guilty of disorderly, contemptuous or insolent behavior, or use any insulting or contemptuous or indecorous language or expression to or before any court martial or court of inquiry, or any member of either of such courts, in open court, may be committed to the jail of the county in which such court shall sit, by warrant under the hand and seal of the president of such court, or in his absence, of that of the senior officer present and presiding. Such warrant shall be directed to the sheriff or any or either of the constables or marshals of any such county, or any officer attending the court, and shall command the officer to whom it is directed to take the body of such person and commit him to the jail of the county, there to remain without bail or mainprize, in close confinement, for a time to be limited, not exceeding three days, and until the officer's fees for committing, and the jailer's fees are paid. And such sheriff shall receive the body of any person who shall be brought to him by virtue of such warrant, and keep him until the officer's and jailer's fees shall be paid, or until the offender be discharged by due course of law.

§ 256. All prisoners committed to any jail upon process for contempt, or committed for misconduct in the cases prescribed by law, shall be actually confined and detained within such jail, until they shall be thence discharged by due course of law, or shall be removed to some other jail or place of confinement, in the cases provided by law; and if any sheriff or keeper of a jail, shall permit or suffer any prisoner so committed to jail for contempt, to go or be at large out of

¹ 3 R. S. 461, §§ 204, 205.

his prison, except by virtue of some writ of habeas corpus, or rule of court, or in such other cases as may be provided by law, he shall be liable to the party aggrieved, for his damages sustained thereby, and shall be deemed guilty of a misdemeanor.¹ When a prisoner is so committed to jail as a punishment for misconduct, he must be kept in prison in the common jail of the county, and in that part of the building appropriated for the prison, and in the same manner as by law persons are required to be imprisoned and detained who are charged with criminal offences, or who are committed for trial. And where one is so committed to prison, it will be an escape if the sheriff, instead of so confining him allows him to occupy the sheriff's sitting room. Such room is no part of the jail though under the same roof.² The duties of the sheriff, when any prisoner in jail is brought out upon habeas corpus, will be pointed out in the chapter treating of his duties generally, under writs of habeas corpus.

§ 257. When one is committed for nonpayment of a fine imposed upon him for contempt of the court; or when he is imprisoned for the nonperformance of some act or duty which it is in his power to perform, he cannot be discharged from the imprisonment on executing an assignment of his property to the creditor;³ nor can he be discharged in such case, by any officer under any insolvent law, or bankrupt law.⁴ If he is committed for the nonpayment of a fine for the breach of an injunction, he cannot be discharged until the fine is paid, without the consent of the injured party.⁵ But the warrant of commitment must show upon its face that the defendant was convicted of a contempt, and that the sum he was ordered to pay was a fine imposed upon him on such conviction, and not costs merely, else the sheriff will not be liable for allowing him the benefit of the liberties of the jail.⁶

§ 258. When any person shall be confined in any county prison for the nonpayment of any fine not exceeding two hundred and fifty dollars, imposed for any criminal offence, and against whom no other cause of detention shall exist, on satisfactory proof being made to the county court of the county in which such prisoner may be confined, that he is unable, and has been ever since his conviction, to pay such fine, the court may, in its discretion, order his discharge.⁷

§ 259. If any person, party or witness, disobey an order of the judge

¹ 3 R. S. 736, § 82.

² 10 Paige 606, *The People ex rel. Backus v. Stone*.

³ 3 Paige 38, *Van Wezel v. Van Wezel*.

⁴ 10 Paige 284, *The People ex rel. Backus v. Spaulding*.

⁵ 7 Paige 364, *Lansing v. Eaton*.

⁶ 4 Paige 282, *The People ex rel. Hawley v. Bennett*.

⁷ 3 R. S. 1066, § 28

or referee made in any proceedings supplementary to the execution and duly served such person, party or witness may be punished by the judge as for a contempt. And in all cases of commitment under chapter second of title ninth of the second part of the Code of Procedure concerning "proceedings supplementary to the execution," or the act to abolish imprisonment for debt, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment, by the court or judge committing him, or the court in which judgment was rendered, on such terms as may be just.¹

§ 260. If any prisoner confined in a county jail, or in a state prison, upon a conviction for a criminal offence shall escape therefrom, he may be pursued retaken and imprisoned again, notwithstanding the term for which he was imprisoned may have expired at the time when he shall be retaken; and shall remain so imprisoned, until tried for such escape, or until he be discharged, on a failure to prosecute therefor.²

§ 261. When one is imprisoned upon any criminal charge, who may be let to bail, and is so let to bail by any court or officer duly authorized to let such person to bail in the particular case, the keeper of the jail where such prisoner is so detained, shall release him from confinement on being served with the order of the court or officer, or officers, that the prisoner has given the proper sureties, and that he be discharged.³

§ 262. It has already been seen that the keeper of every county prison is required to present to every court of oyer and terminer, and to every court of sessions to be held in his county, at the opening of such court, a calendar of the prisoners in such prison.⁴ In making out such list, the officer should enter the names of all prisoners, then in jail awaiting the action of the grand jury, or trial, and also of all witnesses who may be detained therein. But the names of prisoners then in jail under sentence need not be stated.

CHAPTER XV.

OF THE EXECUTION OF SENTENCE. *a*

§ 263. When one has been sentenced to imprisonment in a county jail by any magistrate, sitting as a court of special sessions, or by any

¹ Code, § 302.

² 3 R. S. 965, § 23.

³ Ante, § 131.

⁴ Ante, § 158.

^a Ala.—R. C. § 3917.

Ark.—Dig. 1858, p. 831.

Cal.—Dig. 1860, p. 305.

Del.—R. S. 1852, p. 89.

judge or officer, or officers, in any matter or proceeding where he or they are authorized to sentence one to a county prison, such justice or other officer or officers, shall issue his or their warrant, to be signed by them and directed to the sheriff, constables or marshals of the county, or city and county, and to the jailer thereof, in which the conviction shall be had, specifying the particulars of such judgment. If the sentence be pronounced by the court of special sessions of the peace of the city and county of New York, the warrant shall be under the hand and seal of the first judge, mayor or recorder, who presided; or of the persons who formed such court, and be directed to the sheriff of said city and county.¹ And on the delivery of any such prisoner to the keeper of the county prison, at such prison, together with such warrant, the said keeper shall take such prisoner into his custody, and execute such judgment or sentence.

§ 264. Whenever a sentence of imprisonment in a county jail shall be pronounced by any court of record upon any person convicted of any offence, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, a transcript of the entry of such conviction in the minutes of the court, and of the sentence thereupon duly certified by such clerk, which shall be a sufficient authority to such sheriff to execute such sentence, and he shall execute the same accordingly.²

§ 265. When any convict shall be sentenced to imprisonment in the state prison, the clerk of the court in which such sentence shall be passed, shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall without delay, either in person or by a general and usual deputy, cause such convict to be transported to the proper prison, and delivered to the keeper thereof.³ Such sheriff or deputy while conveying a convict to the proper prison, shall have the same power and the like authority to require the assistance of any citizen of this state, in securing such convict, and retaking him, if he shall escape, as if such sheriff were in the county for which he was

¹ 3 R. S. 369, § 2.

² 3 R. S. 1032, § 13.

³ 3 R. S. 1033, § 14.

Fa.—Dig. 1847, p. 525.

Ia.—Rev. 1860, pp. 824.

Ill.—2 St. 868; Laws 1859, p. 17.

Ind.—2 R. S. 1852, p. 378.

Kan.—Gen. St. 1863, p. 859.

Ky.—2 R. S. 344.

La.—R. S. 163.

Me.—R. S. 715, 719.

Mass.—St. 1860, p. 844.

Mich.—St. 1857, pp. 1101, 1598; Laws 1862, p. 296.

Minn.—Rev. 1866, p. 664.

Miss.—Rev. Code, pp. 616, 625.

Neb.—R. S. 663.

N. H.—Gen. St. 1867, p. 494.

N. J.—Dig. 1855, p. 185.

O.—2 R. S. 1191; Sup't. R. S. 608.

On.—Gen. L. 474.

Penn.—Dig. 1861, p. 248.

Tenn.—Code, pp. 926, 930.

ected, and all persons who shall refuse or neglect to assist such sheriff when required, shall be liable to the same penalties, as if such sheriff were in his own county.¹

§ 266. When any convict shall be sentenced by any court or magistrate having criminal jurisdiction, to the house of refuge, for juvenile delinquents in the city of New York, or the Western House of Refuge for juvenile delinquents, in the city of Rochester, or to any penitentiary, such convict shall be removed by the sheriff of the county, pursuant to such order, to such house of refuge or penitentiary.² When a contract has been made between the board of supervisors of the counties of Broome and Albany, or Broome and Onondaga for the confinement of prisoners sentenced in the county of Broome to confinement in the county jail for a term not less than two months in the penitentiaries of Albany or Onondaga county and a copy of the contract has been delivered to the sheriff of Broome county, it shall be his duty during the existence of any such contract, to convey to such of the penitentiaries as the said contract shall relate to, so many of those confined in jail as vagrants, disorderly persons, or persons committed in default of payment of fines in criminal proceedings, as shall be embraced with the terms of the contract; and the sheriff shall be paid therefor such compensation as the board of supervisors shall deem just.³ All females hereafter convicted in the fifth and sixth judicial districts of the state of crimes punishable in the state prison, shall be sent to the penitentiary at Syracuse. When any court shall sentence any person convicted of any offence punishable with imprisonment in the state prison for a term of five years or less to the Albany county penitentiary, it shall be the duty of the sheriff of the county in which such person shall be convicted and sentenced, to convey such person to the penitentiary, for which he shall be paid by the state treasurer such fees as are allowed by law for conveying convicts to state prison.⁴

§ 267. All the convicts who shall be sentenced to imprisonment in the same prison, or to the same house of refuge, at one session of a criminal court, shall be transported at the same time, unless said court shall expressly direct otherwise.⁵

§ 268. On the delivery of such convict or convicts to the keeper of such prison, or superintendent of such house of refuge, the sheriff or other person having charge of the same shall make and render to the agent, keeper or clerk of the prison, or superintendent of such house

¹ 3 R. S. 1033, § 15; Ante, § 36.

² 3 R. S. 986, §§ 18, 19; *Id.* 988, §§ 27, 28.

³ Laws 1869, ch. 399, §§ 1, 5.

⁴ Laws 1869, ch. 574, §§ 1, 3, 7.

⁵ 3 R. S. 1051, § 20

of refuge, an account of the number of convicts so delivered, and the distance from the prison or house of refuge, to the place of conviction, which account shall then be certified by him on oath to be correct, which oath may be administered by the keeper of the prison or superintendent of the house of refuge; to which shall be added the certificate of either the agent, clerk or keeper of such prison, or superintendent of such house of refuge, setting forth the number of convicts so delivered, and the distance from such prison to the place of the conviction, which account certified and attested as aforesaid, shall, when a convict has been so transported to the state prison, be audited by the comptroller, and paid out of the treasury.¹ When the sheriff shall produce to the comptroller a statement of his account for such services and expenses, certified by the clerk or agent of such prison to be correct, and that there are no funds applicable to the payment thereof, it shall be the duty of the comptroller to draw his warrant on the treasurer in favor of such sheriff for the amount of his account, and the treasurer shall pay the same.²

§ 269. The sheriff shall be allowed the same compensation for transporting convicts to the house of refuge, as is provided by law for the transportation of convicts to the state prison, to be audited and paid as a part of the contingent expenses of the county.³

§ 270. Whenever any convict shall be sentenced to the punishment of death, the court or the major part thereof, of whom the presiding judge shall always be one, shall make out, sign and deliver to the sheriff of the county, a warrant, stating such conviction and sentence, and appointing the day on which such sentence shall be executed; and no judge, court or officer, other than the governor, shall have any authority to reprieve or suspend the execution of any convict sentenced to the punishment of death, except sheriffs, in the case of an insane convict, or a pregnant female and in the manner hereinafter mentioned.⁴

§ 271. If after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence of a justice of the supreme court, or if he be absent from the county, with the concurrence of the county judge of the county in which the conviction was had, may summon a jury of twelve electors to inquire into such insanity, and shall give immediate notice thereof to the district attorney of the county; who shall attend such inquiry, and may produce witnesses before the jury; for which purpose he shall have the same power to issue subpoenas as for witnesses to attend a grand jury, and disobedience thereto may be

¹ 3 R. S. 1050, §§ 18, 19.

³ 3 R. S. 988, § 28.

² 1 R. S. 510, §§ 25, 26.

⁴ 3 R. S. 936, §§ 11 15.

punished by the court of oyer and terminer, which shall next sit in such county, in the same manner as disobedience to any process issued by such court.¹

§ 272. The inquisition of the jury shall be signed by them and the sheriff. If it be found by such inquisition that such convict is insane, the sheriff shall suspend execution of the warrant directing the death of such convict, until he shall receive a warrant from the governor of this state, or from the justices of the supreme court directing the execution of such convict. The sheriff shall immediately transmit such inquisition to the governor, who may, as soon as he shall be convinced of the sanity of such convict, issue a warrant appointing a time and place of his execution, pursuant to his sentence.²

§ 273. If a female convict sentenced to the punishment of death, be pregnant, the sheriff shall in like manner summon a jury of six physicians, and shall give the like notice thereof to the district attorney, who shall attend and have power to issue subpoenas, as in the case of an insane convict, and with the like effect; and an inquisition shall in like manner be made and signed by the jurors and the sheriff. If by such inquisition it appear that such female convict is quick with child, the sheriff shall in like manner suspend execution of her sentence; and shall transmit the inquisition to the governor. And whenever the governor shall be satisfied that such female convict is no longer quick with child, he shall issue his warrant, appointing a day for her execution pursuant to her sentence; or he may in his discretion, commute her punishment to perpetual imprisonment in the state prison.³

§ 274. The jurors upon such inquests should be summoned by the sheriff in the same manner as in other cases, where the selection of jurors is left discretionary with him. Though the statute prescribes no other qualification for the jurors in the case of an insane person, than that they should be electors; and in the case of a pregnant female that they should be physicians, yet it is clearly the duty of the sheriff to select those only against whom no legal exception as jurors exist, and he should be careful not to select any who entertain ill will against the prisoner; or who have conscientious scruples against capital punishment; or who have declared an opinion upon the question. But the mere expression of a hypothetical opinion, that if the facts stated are true, the prisoner is, or is not insane, or is, or is not enceinte, will not necessarily disqualify a juror, but it will be for the sheriff to

¹ 3 R. S. 936, §§ 16, 17.

² 3 R. S. 937, §§ 18, 19.

³ 3 R. S. 937, §§ 20-22.

say, whether such expression of opinion has left any undue bias upon the mind of the juror, or not, and he should allow him to be sworn, or set him aside accordingly. The sheriff presides upon the hearing and swears the jurors and witnesses. The prisoner must be present, and may be attended by counsel. Either party may object to a juror for cause, and it is the sheriff's duty to hear the ground of such objection, and if it is well taken, to set the juror aside and summon another in his place. The truth of the objection may be determined upon the testimony of others, or the juror may himself be examined touching the objection, provided it do not tend to his dishonor or discredit.¹ Every one is presumed to be of sound mind until the contrary be made to appear, and the burthen of proof is therefore thrown upon the prisoner. And so with the female prisoner claiming to be enceinte. She is not to be presumed so until the fact be made to appear. The prisoner therefore holds the affirmative of the issue, and will be entitled to the closing reply. In the latter case the issue is obvious, and no difficulty can arise in determining the form of the inquiry to the witness, or the verdict to be rendered by the jury. In the case of one supposed to be insane, the inquiry should be whether the prisoner, at the time, has sufficient mind rightly to comprehend his own condition, or whether he is laboring under such a diseased state of mind as to be really unconscious of his situation, and the nature and purpose of the punishment about to be inflicted upon him.

§ 275. Whenever for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the same shall stand in full force, the supreme court on application of the attorney general, or of the district attorney of the county where the conviction was had, shall issue a writ of habeas corpus to bring up such convict before such court; or if he be at large, a warrant for his apprehension may be issued by the court or any justice thereof. And upon such convict being brought before the court, they shall proceed to inquire into the facts and circumstances, and if no legal reasons exist against the execution of such sentence, they shall sign a warrant to the sheriff of the proper county, commanding him to do execution of such sentence, at such time as shall be appointed therein; which shall be obeyed by such sheriff accordingly. But the court before which an appeal from the conviction is had, may order the sentence to be carried into effect, without bringing up the defendant on habeas corpus.²

§ 276. The punishment of death shall in all cases be inflicted by

¹ Graham's Pr. 308.

² 3 R. S. 937, §§ 23, 24; 13 Wend. 159
The People v. Enoch.

hanging the convict by the neck until he be dead; and such punishment shall be inflicted within the walls of the prison of the county, in which such conviction shall have taken place, or within a yard or enclosure adjoining said prison, except in the case mentioned in the next section. And it shall be the duty of the sheriff or under sheriff of the county, to be present at such execution, and to invite the presence by at least three days previous notice, of the judges, district attorney, clerk and surrogate of said county, together with two physicians and twelve reputable citizens, to be selected by the sheriff or under sheriff; and the sheriff or under sheriff shall, at the request of the criminal, permit such minister or ministers of the gospel, not exceeding two, as said criminal shall name, and any of the immediate relatives of said criminal, to attend and be present at such execution and also such officers of the prison, deputies and constables, as said sheriff or under sheriff shall deem expedient to have present; but no other persons than those herein mentioned shall be permitted to be present at such execution, nor shall any person under age be allowed to witness the same.¹

§ 277. If in any county there shall not be a jail, or the jail erected shall become unfit or unsafe for the confinement of prisoners, or shall be destroyed by fire or otherwise, and the county judge of such county shall have according to law designated the jail of some contiguous county for the confinement of the prisoners of the county, it shall be the duty of the sheriff of the county in which such convict sentenced to death shall be confined, to attend upon the day appointed for the execution of the sentence at the jail of said county, designated by said judge, and there conduct the proceedings and execute the sentence in all respects as if the jail was located in the county where such conviction was had.²

§ 278. The sheriff, or under sheriff and judges attending such execution, shall prepare and sign, officially, a certificate setting forth the time and place thereof, and that such criminal was then and there executed in conformity to the sentence of the court, and the provisions of the statute; and shall procure to said certificate the signatures of the other public officers and persons, not relatives of the criminal, who witnessed such execution; and the sheriff or under-sheriff shall cause such certificate to be filed in the office of the clerk of said county, and a copy thereof to be published in the state paper, and in one newspaper, if any, published in said county.³

§ 279. If the allowance of a writ of error, in a criminal case, direct

¹ 3 R. S. 968, § 25, 26, 27.

² 3 R. S. 938, § 29.

³ 3 R. S. 938, § 28.

a stay of proceedings, and the defendant be in the custody of the sheriff, it shall be the duty of such sheriff, upon being served with the clerk's certificate of the filing of such writ, and a copy of the allowance thereof, to keep such defendant in his custody without executing the sentence which may have been passed upon such indictment, and to detain such defendant to abide such judgment as may be rendered upon such writ of error, unless the sentence be that of death. But such prisoner, if the offence be punishable in the state prison or county jail, may be brought up on habeas corpus, when allowed by a justice of the supreme court and thereupon let to bail.¹

CHAPTER XVI.

OF THE EXECUTION OF PROCESS IN CIVIL CASES.

§ 280. The general character of the powers and duties of sheriffs in civil matters and proceedings, have already been pointed out. It has been seen that sheriffs are the immediate officers of every court of record, of civil as well as criminal jurisdiction in the state, to whom all process of such courts must be directed and delivered for execution, and that they are bound to execute the same. Their powers and duties in the execution of civil process differ from those imposed upon them in the execution of process in criminal matters, while the responsibility they incur in the execution of the former is generally much greater than in the latter. If they wilfully, negligently or erroneously fail to perform their whole duty in the execution of civil process, they are liable to the plaintiff to the extent of the damages he has sustained thereby; while if they shall in any respect exceed the powers conferred upon them by their office or the process under which they act, they become liable to the party aggrieved, whether he be the defendant in the process or a stranger; and in either case they are liable to punishment by indictment. They must perform their whole duty promptly and faithfully, but they must not exceed their authority and there must be no error in the discharge of their duties.

§ 281. When process is delivered to any sheriff for service, which does not require the arrest of the defendant, or the seizure of his property, it will be immaterial to such officer whether such process is regular or irregular, and he should serve or execute the same according to the command thereof, and make proper return thereto, if a return is necessary.

¹ 3 R. S. 1034, §§ 19, 20.

§ 282. But where process which requires or authorizes the arrest of any party, or the seizure of his goods, is directed and delivered to any sheriff for execution, he should, before proceeding to execute the same, ascertain if such process is in due form, and is regular upon its face; for if such process is void upon its face, that is, if it contains any thing showing that there was any defect of jurisdiction in the court or officer issuing such process, of the subject matter or of the person of the party to be affected, the sheriff should not execute it; and if he does, or attempts to do so, he will be a trespasser.¹

§ 283. But if the process is issued by a court or officer having jurisdiction of the subject matter, and there is nothing upon the face of such process to show that such court or officer has not also jurisdiction of the person of the party to be affected by such process, the officer to whom such process is directed and delivered, may execute the same though it be in fact absolutely void, and it will be a complete protection to him for all acts done under it as fully as if the same was not so void.² In general the sheriff ought not to look beyond his process to ascertain if it is regular, or whether the court or officer had jurisdiction of the defendant, whether such process issue from a court or officer of special or limited jurisdiction; and in no case need he do so.³ Thus where an execution is directed and delivered to him for execution, he is not bound to inquire whether there is a judgment to support it, or whether the execution corresponds exactly with the judgment.⁴ Nor will it make any difference that the sheriff is himself aware of the fact that the officer or court had no jurisdiction. He must be governed and is protected by the process and he cannot be affected by any thing which he has learned out of it, as going to impeach it.⁵ And the fact that the officer has taken an indemnity will not deprive him of the protection of his process.⁶

§ 284. But though the sheriff may execute process void for want of jurisdiction, if such defect is not apparent upon the face of it, yet he is not bound to do so, and he may refuse, or he may stop its execution on discovering that fact, and no action will lie against him for so refusing.⁷ But neither a constable nor his surety can avail

¹ Watson 53; Sewell 99, 100.

² 5 Wend. 170, Savacool v. Boughton; 5 Wend. 231, Wilcox v. Smith; 5 Wend. 240, McGuinty v. Herrick; 16 Wend. 562, Earl v. Camp; 1 Seld. 376, Chagary v. Jenkins; 1 Hill 118, Horton v. Hendershott; 1 Scam. (Ill.) 201, Brother v. Cannon; 7 Blackf. (Ind.) 270, Gott v. Mitchell.

³ 16 Wend. 562, Earl v. Camp; 19 Barb. 283, Landt v. Hilts.

⁴ 12 Wend. 96, Parmelee v. Hitchcock; 3 Barb. 17, Dominick v. Eacker; 3 Seld. 195, Bacon v. Cropsey.

⁵ Ante § 56; 5 Hill 440, The People v. Warren; 24 Wend. 485, Webber v. Gay.

⁶ 1 Hill, 118, Horton v. Hendershott.

⁷ 16 Wend. 562, Earl v. Camp; 7 Hill 35, Cornell v. Barnes; 3 Seld. 195, Bacon v. Cropsey; Breese (Ill.) 145 Flack v. Ankeny.

themselves of an omission by the justice to comply with the requirements of the statute relative to the mode of entering judgments by confession when sued for not paying over money collected on the execution;¹ nor can a sheriff refuse to execute an execution on the ground that it was issued for too much.²

§ 285. If the process is issued by a court or officer of competent jurisdiction and is not void for any reason, it will be the duty of the sheriff to execute it, according to the command thereof, although such process may have defects upon its face which render it voidable. If it is irregular and not void, that may affect the party issuing it, but not the ministerial officer who executes it. He is answerable alone in such case for the manner in which he executes it.³ Thus if process has the seal of the wrong court upon it; or be tested upon Sunday, or the like, these defects will render it voidable, but will not excuse the officer from neglecting to execute it.

§ 286. The rule that an officer is justified by his process, not void upon its face, is one of protection only. And if it is in fact void, he cannot build up a title under it which will enable him to maintain an action against third persons.⁴

§ 287. Process in a civil cause must be executed by the sheriff in the manner and within the time required or prescribed by law; and if he neglects, or by unreasonable delay the debtor absconds, or his goods are removed or seized or sold by some other officer, upon other process, he will be liable to the party aggrieved.⁵ But the sheriff is not bound to start on the instant of receiving process to execute it, without regard to every thing else.⁶ And when he seizes property, if it be lost, he will be excused if he exercised such care as a careful, prudent man of good sense and judgment would take of his own property; and this whether the process by which it is held is mesne or final.⁷

§ 288. In civil matters, the powers of the sheriff are, with few exceptions, confined to the limits of his county in regard to compulsory acts.⁸ He may return a writ, or make return to a mandamus, or assign a bond, or do any other act of the kind, which is not compulsory, out of his county.⁹ But he cannot make an arrest, nor seize the goods of a defendant beyond the limits of his county, and if he does his acts will be void, and he will be a trespasser.¹⁰ And

¹ 3 Wend. 282, *German v. Swartwout*.

² 12 Wend. 96, *Parmelee v. Hitchcock*;

3 Seld. 195, *Bacon v. Cropsey*.

³ 3 Barb. 17, *Dominick v. Eacker*; 12 Wend. 96, *Parmelee v. Hitchcock*;

3 Seld. 195, *Bacon v. Cropsey*.

⁴ 16 Wend. 562, *Earl v. Camp*; 1 Hill 118, *Horton v. Hendershott*; 2 Denio 643, *Dunlap v. Hunting*.

⁵ 3 R. S. 739, § 98; 10 Wend. 267, *Hinman v. Borden*.

⁶ 13 Cal. 335, *Whitney v. Butterfield*.

⁷ 21 N. Y. 10, *Moore v. Westervelt*; S. C. 27 N. Y. 238.

⁸ 1 R. S. 383, §§ 13, 14.

⁹ Allen 15.

¹⁰ Watson 89.

he cannot sell lands in another state on an execution issued to him on a judgment rendered in this state.¹ But if he has made a legal arrest in his own county, he may pass through other counties with the prisoner, if in the direct route of travel from the place of arrest to the place where the defendant is to be taken.² And so he may remove a prisoner beyond the limits of his county when the jail of an adjoining county has been designated as the jail of the county.³ He may also convey his prisoner through other counties on habeas corpus; and on fresh pursuit he may retake a prisoner in another county, or even state, who has escaped either from an arrest, the jail or from the liberties thereof.⁴ He may also execute an attachment against a witness for disobeying a subpœna, issued by any court of record, in any county in the state.⁵ And where any county has been or shall be divided, any judgment that may have been recovered previous to such division, or after such division upon any proceedings instituted previous thereto, in the county court of such county, or before any justice of the peace thereof, may be collected by execution to be issued to the sheriff of the county where such judgment shall have been rendered, or to a constable thereof, as the case may require, who shall execute the same, in the same manner, as if such division had not been made.⁶

§ 289. Whenever it shall satisfactorily appear to any court, or any judge of the supreme court, or any county judge, by the return or affidavit of any sheriff, deputy sheriff, or constable authorized to serve or execute any process or paper for the commencement, or in the prosecution of any action or proceeding, that proper and diligent effort has been made to serve any such process or paper on any defendant in any such action, residing in this state, and that such defendant cannot be found, or if found, avoids or evades such service, so that the same cannot be made personally, by such proper diligence and effort, such court or judge, may by order, direct the service of any summons, subpœna, order, notice and other process or paper to be made by leaving a copy thereof at the residence of the person to be served, with some person of proper age, if admittance can be obtained, and such proper person found, who will receive the same, and if admittance cannot be obtained, or any such proper person found, who will receive the same, by affixing the same to the outer or other door of said residence, and by putting another copy thereof, properly

¹ 29 Barb. 585, *Runk v. St. John*.

² 3 R. S. 724, §§ 6, 7; 9 Wend. 204,
Love v. Humphrey.

³ Ante, § 215.

⁴ Ante, § 137.

⁵ Ante, § 185.

⁶ 3 R. S. 870, § 37.

folded or enveloped, and directed to the person to be served at his place of residence, into the post office in the town or city where such defendant resides, and paying the postage thereon. On filing with the clerk of the county where such defendant resides, or the county in which the complaint in any such action is by law to be filed, an affidavit showing service according to such order, such summons, subpoena, order, notice, or other process or paper shall be deemed served and the same proceedings may be taken thereon as if the same had been served by delivery to such defendant personally or otherwise, as by law now required; but the court may, upon any application by them deemed reasonable, at any time, permit any defendant to appear and defend, or have such other relief, in any action or proceeding founded on any such service as the nature of the case may require.¹

CHAPTER XVII.

OF ARRESTS IN CIVIL CASES.

§ 290. Formerly all persons, with few exceptions, were liable to arrest and imprisonment on civil process, as of course, and without any order of a court or officer authorizing such arrest. But it is otherwise since the law of 1831, abolishing imprisonment for debt, and now no one can be arrested, except in the cases and in the manner pointed out by that act; on attachments for contempts, which indeed are in the nature of criminal process; upon writs of *ne exeat*, and in a few special cases, and in the cases provided by the Code of Procedure. In all these cases however, the writ, process or order for the arrest is granted by the court, in which the action is brought, or by a judge or officer authorized to perform the duties of a judge at chambers. And in no case can one having a claim or demand against another, no matter what may be the character of such claim, authorize or require his arrest in the commencement of the action or proceeding without such order.

§ 291. There are, however, certain persons who are exempt from arrest in civil cases, and although a proper writ may have been allowed, or order made for their arrest in any case, the sheriff may render himself liable to punishment if he executes such process. The cases in which he should not arrest, and the cases in which he may arrest such persons so exempt, will be pointed out in the succeeding sections.

§ 292. If any writ or process shall be sued or prosecuted by any person, whereby the person of any ambassador or other public minister

¹ 3 R. S. 739, § 100.

or any domestic, or domestic servant of any such ambassador or public minister, may be arrested or imprisoned, or his or their chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void to all intents, construction and purposes whatsoever. And in case any person shall sue forth or prosecute any such writ or process, such person, and all attorneys and solicitors prosecuting or soliciting such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations, and disturbers of the public repose, and be imprisoned not exceeding three years, and fined at the discretion of the court.¹ But no citizen of the United States, who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debt shall be still due and unpaid, shall have, take or receive any benefit of the act, nor shall any person be proceeded against by virtue of said act, for having arrested or sued any other domestic servant of any ambassador or other public minister, unless the name of such servant be first registered in the office of the secretary of state, and by such secretary transmitted to the marshal of the district in which congress shall reside, who shall, upon receipt thereof, affix the same in some public place in his office, to which all persons may resort to take copies without fee or reward.² The privilege from arrest extends as well to ambassadors and public ministers accredited to another country, while passing through this state in the discharge of their mission, as to those accredited to this government.³

§ 293. The state courts have no jurisdiction in the case of a consul of a foreign government residing in the United States. And the fact that such consul is impleaded with a citizen upon a joint contract, will not give jurisdiction to a state court. His exemption is not a personal privilege, nor the privilege of his government, and it cannot be waived by his appearing in an action in the state courts and pleading to the merits.⁴

§ 294. All noncommissioned officers, artificers, privates, and musicians, seamen and marines, who are and who shall be enlisted, and the noncommissioned officers, artificers, privates and musicians of the militia, or any other officer who, at any time may be in the actual service of the United States, shall be exempt during their term of service, from all personal arrests for any debt or contract. And whenever any noncommissioned officer, artificer, private or musician, shall be arrested, whether by mesne process, or in execution, contrary to

¹ Laws U. S., Act April 30th, 1790, §§ 25, 26.

² Laws U. S. Act April 30th, 1790, § 27.

³ 4 Sandf. 619, *Holbrook v. Henderson*.

⁴ 3 Seld. 576, *Valarino v. Thompson*;
5 Barb 115 *Flynn v. Stoughton*.

the intent hereof, it shall be the duty of the judge of the district court of the United States, and any court or judge of a state, who by the laws of such state are authorized to issue writs of habeas corpus, respectively, on application by an officer, to grant a writ of habeas corpus returnable before himself; and upon due hearing and examination, in a summary manner, to discharge the noncommissioned officer, artificer, private, or musician from such arrest, taking common bail, if required, in any case upon mesne process, and commit him to the applicant or some other officer of the same corps. No noncommissioned officer, musician, or private, shall be arrested, or subject to arrest, or to be taken on execution for any debt under the sum of twenty dollars, contracted before enlistment, nor for any debt contracted after enlistment.¹ The officers, noncommissioned officers, musicians and privates, of the marine corps, shall during the period of their enlistment, be exempt from all personal arrest for debt or contract.²

§ 295. The senators and representatives in congress, shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same.³

§ 296. Every member of the legislature shall be privileged from arrest on civil process, during his attendance at the session of the house to which he shall belong, except on process issued in any suit brought against him for any forfeiture, misdemeanor, or breach of trust in any office or place of public trust held by him. Each member shall enjoy the like privilege for the space of fourteen days previous to any such session, and also while going to or returning from such session, provided the time of such going or returning do not exceed fourteen days. Such member shall also enjoy the like privilege after any adjournment of the legislature, until its next meeting, when such adjournment shall not exceed fourteen days; and also while absent with leave of the house to which he shall belong.⁴ But such member may be arrested after he has returned to his home, upon a final adjournment, though the fourteen days have not expired.⁵ No officer of either house, whilst in actual attendance upon the house, shall be liable to arrest upon civil process. The arresting a member or officer of either house of the legislature is declared a breach of the privilege of such house, and may be punished by such house as for a contempt;

¹ Laws U. S. Act Jan. 11th, 1798, § 5;
Act Mar. 15th, 1799, § 9; Act Mar.
30th, 1802, § 23.

² Laws U. S. Act June 30, 1834, § 5.

³ Cons. U. S. Art. 1, § 6, sub. 1.

⁴ 1 R. S. 455, §§ 6-9.

⁵ 4 Wend. 204, *Cory v. Russell*.

but when the punishment therefor is by imprisonment it shall not extend beyond the same session of the legislature.¹

§ 297. No person holding office under the acts organizing the Metropolitan or Capital police shall be liable to arrest on civil process, nor to the service of a subpoena from civil courts while actually on duty,² and the act organizing the Niagara Frontier Police, declares that no person holding office under that act shall be liable to military or jury duty, or to arrest on civil process.³

§ 298. No female shall be arrested except for wilful injury to person or character, or property;⁴ and the concealment and disposal of a piano is not an injury to property, within the meaning of the code.⁵ If the female be a married woman, neither she nor her husband can be arrested for an assault and battery by her.⁶ A married woman cannot be arrested for costs.⁷

§ 299. All officers of the several courts of record, including sheriffs,⁸ shall be liable to arrest, on any process against the body, and may be held to bail in the same manner as other persons, except during the actual sitting of the court of which they are officers; and when sued with any other person, such officer shall be liable to arrest, and may be held to bail as other persons, during the sitting of the court of which there are officers; but no attorney, or counsellor, or solicitor, shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending, and then to be heard in such court.⁹ And such attorney and counsellor are not privileged from arrest, although such arrest prevents their contemplated attendance upon court, if the arrest be made whilst they remain at home.¹⁰ And they are not exempt from arrest when they are before a master, examiner, or judge, out of court.¹¹ Nor where the proceedings against them are in the name of the people;¹² nor when one has ceased to practice for a year, and has entered into other employment.¹³

§ 300. All parties to a suit are exempt from arrest during their attendance at court, or before arbitrators, or referees, or other judicial proceedings, and in going to and returning therefrom.¹⁴ But one convicted of an assault and battery, at a court of special sessions, it has

¹ 1 R. S. 455, §§ 10, 13, 14.

² Laws 1864, ch. 403, § 34; Laws 1865, ch. 554, § 27.

³ Laws 1866, ch. 484, § 30.

⁴ Code, § 179.

⁵ 2 Sandf. 729, Tracy v. Leland.

⁶ 8 How. 134, Anonymous.

⁷ 22 How. 500, Neville v. Neville; 25 How. 94, Moncrief v. Ward; 42 Barb. 435, Hovey v. Starr.

⁸ 10 How. 46, Hill v. Lott; 6 John 23 Day v. Brett.

⁹ 3 R. S. 480, § 74.

¹⁰ 4 Wend. 204, Cory v. Russell.

¹¹ 4 Hill 59, Coe v. McClellan.

¹² 4 Cow. 143, The People v. Rossiter.

¹³ 2 John Ca. 102, Brooks v. Patterson.

¹⁴ 2 Wend. 257, Clark v. Grant; 1 Ed Ch. 118, Van Wezel v. Van Wezel.

been held, was not protected in returning therefrom, from arrest in a civil action for the same offence.¹

§ 301. Every person duly and in good faith subpœnaed as a witness to attend any court, officer, commissioner, or referee, or summoned to attend any judge, officer, or commissioner, in any case where the attendance of such witness may by law be enforced by attachment or by commitment, shall be exonerated from arrest in any civil suit, while going to the place where he shall be required by such subpœna to attend, while remaining at such place, and while returning therefrom.² But a person so attending a court or officer, is not entitled to the privilege of a witness from arrest, unless he attend as a witness; and it is not sufficient that he is afterwards examined in the cause.³ The court or officer before whom any person shall have been in good faith, subpœnaed to attend as a witness, shall discharge such witness from arrest made in violation of his privilege; and if such court shall have adjourned before such arrest was made, and before application for such discharge be made, any judge of such court, or the county judge shall have the same power to discharge such witness. Every arrest of a witness made contrary to the foregoing provisions, shall be absolutely void, and shall be deemed a contempt of the court issuing the subpœna; and every person making such arrest, shall be responsible to the witness arrested for three times the amount of the damages which shall be found by the jury, and shall also be liable to an action at the suit of the party who subpœnaed such witness, for the loss, hindrance, and damages sustained by him in consequence of such arrest. But no sheriff or other officer or person shall be so liable, unless the person claiming an exemption from arrest, shall, if required by such sheriff or officer, make an affidavit, stating:

1. That he has been legally subpœnaed as a witness to attend before some court or officer, specifying such court or officer, the place of attendance, and the cause in which he shall have been subpœnaed; and,
2. That he has not been subpœnaed by his own procurement, with the intent of avoiding the service of any process;

Which affidavit may be taken by such officer, and when so taken shall exonerate such officer from all liability for not making such arrest.⁴ When a witness is arrested, and neglects to claim his privilege, and the sheriff is not aware that he is so privileged, he waives such privilege by giving bail.⁵

¹ 1 Denio 666, *Lucas v. Albee*.

² 3 R. S. 685, § 65.

³ 4 Hill 59, *Coe v. McClellan*

⁴ 3 R. S. 685, §§ 66-69.

⁵ 15 Barb. 26, *Stewart v. Howard*.

§ 302. No person belonging to the military forces shall be arrested 'on any civil process while going to, remaining at, or returning from any place which he may be required to attend for military duty.'¹ And where an attachment was issued against one for not paying alimony and the sheriff refused to execute it on the ground that the party was a member of a regiment of the militia of this state mustered into the service of the United States and exempt, it was held that the sheriff might do so, though he was not bound to take notice of the exemption.²

§ 303. Whenever any election shall be held in any city or town of this state, under the general election law, or any town meeting shall be held in any town, no declaration by which a suit shall be commenced, or any civil process, or proceeding in the nature of civil process, shall be served on any elector entitled to vote in such city or town on the day on which such election or town meeting shall be held.³ But a judicial sale is not within the statute.⁴

§ 304. Any sheriff or other officer, who shall have arrested any prisoner in any county, may pass over, across, and through such parts of any other county or counties, as shall be in the ordinary route of travel from the place where such prisoner shall have been arrested to the place where he is to be conveyed and delivered, according to the command of the process by which such arrest shall have been made. Such conveyance shall not, in any case, be deemed an escape; nor shall the prisoner so conveyed, or the officers having him in their custody, be liable to arrest on any civil process, while passing through such other county or counties. And all persons concerned in the second arrest of a prisoner in the case mentioned, with knowledge of the previous arrest are answerable as for an unlawful arrest.⁵

§ 305. Where a prisoner has been duly arrested, and is in custody of the sheriff, or has been committed to jail, in a civil or criminal case, or is upon the limits, he is in the custody of the law, and he cannot be arrested or taken out of the custody of the officer holding him upon any subsequent process or execution in a civil or criminal matter, unless upon habeas corpus, duly issued; and if the officer having him in custody under such first process, allow him to be so taken out of his custody, it will be an escape.⁶ But where the prisoner is under arrest, upon a criminal charge, he may be subject

¹ Military Code 1870, § 257.

² 40 N. Y. 133, *The People ex rel. Gaston v. Campbell*.

³ 1 R. S. 418, § 3; 1 R. S. 819, § 22; 20 Wend. 681, *Corlies v. Holmes*.

⁴ 37 N. Y. 157, *King v. Platt*.

⁵ 3 R. S. 724, §§ 6, 7; 3 R. S. 1043 §§ 53, 54; 9 Wend. 204, *Love v. Humphrey*.

⁶ 9 How. 93, *Brown v. Tracy*.

to arrest in a civil action, if leave of the court or of a judge in vacation is first granted.¹

§ 306. No acting commissioner, superintendent of repairs, collector or lock keeper, on any canal, shall be held to bail, or taken by warrant, in any civil suit, for any act done, or omitted to be done by him in the exercise of his official duties.²

§ 307. It will be seen that the sheriff must not attempt to arrest an ambassador or other public minister, or his secretary or servant, except in the cases mentioned, where such servant may be arrested; nor should he arrest any member of congress in this state, or when passing through it, or any member or officer of either house of the legislature, during the time that they are so exempt. Nor should he arrest any female, or canal officer, if it should appear from the process that they are exempt from arrest in the particular case. In the case of other exemptions mentioned, except in that of attorneys and counsellors, the sheriff may, or may not arrest the party as he may think proper. But if he refuses to arrest one on proper process, in any such case, it will at the peril of showing in any action brought against him for so refusing to make such arrest, or for an escape, that the exemption claimed by such person was well founded. If he does arrest any person so exempt, no action will lie against him, except where he refuses to release a witness who has made, or offers to make the proper affidavit, to entitle him to a discharge. It would seem therefore, to be the safest course for the sheriff to pursue, to arrest in all cases where he may do so without incurring liability, and leave the party to obtain his discharge by application to the court. And in the case of attorneys and counsellors, he must do so, for though they may be exempt from arrest at the time, yet if the sheriff refuses to take them, or releases them after arrest, unless by order of the court, he will be liable for an escape.³

§ 308. After one has been arrested and discharged by reason of being temporarily exempt, as where he is attending the trial of a cause in which he is a party or a witness, he may be arrested again by the officer, on the same process after such temporary exemption is removed.⁴

§ 309. The defendant must be arrested if he can be found in the county to which the process is issued, within reasonable time after

¹ 10 Wend. 636, *Williams v. Bacon*.

² 1 R. S. 588, § 61.

³ 11 John. 433, *Ray v. Hogeboom*; 18 John. 52, *Secor v. Bell*; 1 Wend. 32, *Sperry v. Willard*; 11 Me. 91, *Varrill v. Heald*; 40 N. Y. 133, *The People ex rel. Gaston v. Campbell*.

⁴ 1 Ed. Ch. 118, *Van Wezel v. Van Wezel*; 5 Wend. 90, *Humphrey v. Cumming*; 18 John. 52, *Secor v. Bell*; 8 Pick. 137, *Commonwealth v. Brockett*.

the writ or order is delivered to the sheriff, and on or before the return day.¹ But the officer may return process upon the morning of the return day thereof, although he might subsequently have arrested the defendant.²

§ 310. The sheriff or his general deputy, acting within his county, is not bound to show his warrant for the arrest. And when a demand to see it is made, his refusal to show it will not make him a trespasser, if he in fact has such process.³ But it is well for the officer to show his authority in all cases, as it may prevent resistance, and a special deputy must do so.⁴ And if required by the defendant the officer must deliver to him, without fee, a copy of the process.⁵

§ 311. The arrest should be made by actual seizure of the defendant's body. But any touching, however slight is sufficient; as if the officer lays his hand on the defendant and says, "I arrest you," without saying at whose suit, or by what process, unless required by the defendant, it is a good arrest. And it has been held a good arrest, while the defendant's hand was out of the window, the officer laid hold of it. But no manual touching of the body, or actual force is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer and submit to the arrest.⁶ Nor is it necessary that the arrest should be made by the officer to whom the process is directed; nor need he be in sight, when the arrest is made. It may be done by another, sent forward at some distance, and out of sight. Nor is any exact distance prescribed. It is sufficient if the officer be near and acting in the arrest. And where the arrest was made by the officer's son, the officer himself being out of sight, and two hundred yards distant, such arrest was held good, in an action against the sheriff for an escape.⁷ But words only do not make an arrest, as where the officer goes to the party and says, "I arrest you," unless the party submits.⁸ And where, in such case the officer merely utters the words, and before he touches the prisoner he runs away, or the officer is beaten off, it is no arrest. And so where the officer read his warrant to the defendant, and then having taken his fee, proceeded to the defendant's attorney to let him know it in order to put in bail, and afterwards returned that he had arrested the party, it was held to be no arrest.⁹ And likewise where the officer sent his servant to the party to inform him that there was a

¹ 9 John. 117, *Adams v. Freeman*.

² 10 Wend. 367, *Hinman v. Borden*.

³ 10 Wend. 514, *Arnold v. Steeves*.

⁴ *Sew. 105*; 10 Wend. 514, *Arnold v. Steeves*.

⁵ 3 R. S. 739, § 97.

⁶ 1 Salk. 79, *Wilson v. Tucker*; Wat-

son 90; *Sewell 130*; *Allen 96*; 1 Wend. 210, *Gold v. Bissell*.

⁷ *Cowper 63*, *Blatch v. Archer*; *Watson 65*; *Sewell 130*.

⁸ *Watson 90*.

⁹ *Allen 96*.

writ out against him, and that he must come and give bail, it was held no arrest, for the messenger had no warrant.¹

§ 312. The arrest may be made by the sheriff in any part of his county, and in any place, upon the premises or in any building of the defendant, or of any other person, even in a dwelling house, if the outer door is open.² If the defendant be in any building other than the dwelling house of such defendant, and admittance is refused, the officer may break open all doors, windows, closets, boxes, chests, and drawers, to come at him. And so when the officer is once within the walls of even a dwelling house, by having peacefully and lawfully entered at the outer door, he may break open every inner door, closet, box, drawer, or trunk to execute his process. But when it is necessary to break an outer or inner door, box, chest, drawer, or trunk, he should first demand that the same be opened before proceeding forcibly to open them. This however, would seem to be necessary only in a case where the defendant is not in the house, or the officer has no reasonable grounds for believing him to be secreted therein.³

§ 313. Although as has been seen, the sheriff may enter the defendant's dwelling, peacefully if he can, he has no right to do so in the absence of himself and family, and against his known wishes; as where the door is fastened or latched, to arrest the occupant or any of his family, domestic servants, permanent boarders, or persons who make the house their home; for the mere raising a latch, or lifting a window to obtain entrance to serve civil process in such a case, is a breaking the house which cannot be justified.⁴ And it has been held that when on rapping at the door, it was opened by a member of the family to see who was there, and the officer forcibly rushed in and made an arrest, the entering and arrest were unlawful. For the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.⁵ This is not considered the privilege of the debtor, but is annexed to the house for the protection of a man and his family.⁶ This privilege does not extend to any barn, store, warehouse, or other building, detached from such dwelling.⁷

§ 314. A dwelling house is any building used for the habitation and dwelling of man, in which a burglary may be committed.⁸ And it

¹ Allen 96.

Watson 90; Cro. Eliz. 909; 3 Bos. & Pull. 228, Ratcliff v. Burton; 16 John. 287, Haggerty v. Wilber; 17 John. 127, Hubbard v. Mack.

² Cowper 1, Lee v. Gansel; 3 Bos. & Pul. 228, Ratcliff v. Burton; 5 Coke 92, Semayne's case.

⁴ 4 Hill, 437, Curtis v. Hubbard.

⁵ Coke 92, Semayne's case; 2 Hawks (N. C.) 246; State v. Armfield; 1 Hill, 337, Curtis v. Hubbard; 4 Id. 437; 13 Mass. 520, Oysteed v. Shed.

⁶ Cowper 1, Lee v. Gansel.

⁷ Watson 59; 16 John. 287, Haggerty v. Wilber.

⁸ Sewell 110; Cowper 1, Lee v. Gansel.

comprehends not only the very house, but all outhouses which are parcel thereof, if immediately connected therewith. But a booth or tent erected in a market or fair is not a dwelling house, though the owner lodge therein. Sometimes even a portion of a building is held to be a dwelling house, as sets of chambers in an inn, or court, or college, when held under distinct titles, and unconnected with each other in their nature and manner of occupation, as if they were under separate roofs. And so where a whole house is let to lodgers, and the owner does not inhabit any part of it, though there is only one door common to all the inmates, yet every separate apartment is the distinct mansion house of its respective possessor. And the outer door of each of such several apartments, whether leading into the air or into a covered way, is the outer door of such several dwellings. But if the landlord occupies but a single apartment in the house, he is considered in law the occupant of the whole. So one dwelling may become severed and may form two, as where the owner let a part and severs it from the other, and makes doors into the street. If however, there is any internal communication, even by a trap door and ladder, and that seldom used, if never fastened, there is no severance and there is but one dwelling.¹

§ 315. To constitute a dwelling house, and confer upon it the privilege and exemption of a mansion house against entry under civil process to make arrest, or to make a levy, it must at the time be used and occupied as a dwelling house. It may have been erected for and used as a dwelling house, but if it is not actually so used or occupied at the time, it is not a dwelling house within the meaning of the law. It appears, says Russell in his work on Crimes, to be well settled that unless the owner has taken possession of the house by inhabiting it personally, or by some of his family, it will not have become his dwelling house, in the proper meaning of the word. "There are several cases to this effect which sufficiently overrule any different opinion which may have been formerly entertained." Thus where a tenant has taken possession and put some of his goods in the house, while it is under repairs, but no one slept in it, such house is not the dwelling house of any one. Nor will a house be the dwelling house of a tenant, though he has taken possession, after the old one has quit, and has put all his furniture into it, and has generally gone to it in the day time, if neither he nor any of his family have yet slept in it. And though persons sleep in a house thus situated, yet if they are not of the family of the occupant, as where persons are procured

¹ Sewell 110, 111.

to sleep there to protect the house or goods within, not of the occupants of the family, or a domestic servant therein, it will not be a dwelling house. And so where the owner of a dwelling house has no intention of going to reside in it himself, and merely puts some person to sleep there at night, till he can get a tenant, the same rule prevails; nor will it, in such case, make any difference if a servant of the owner actually sleeps therein to protect the goods. It is neither the dwelling of the owner, nor of the servant. Nor will a house be the dwelling house of one who occupies it as his place of business and dines there daily, but lodges with his mother who resides next door. And the mere casual use of a tenement, as a lodging, or the using it only upon some particular occasions, will not be such an inhabiting as will constitute such place a dwelling house, as where a servant sleeps in a barn for some nights for the purpose of watching thieves, or where a porter lies in a warehouse to watch goods.¹

§ 316. But where the owner has once entered upon the possession and occupation of a dwelling house, by himself or some one of his family, it will not cease to be his dwelling house, on account of any occasional or temporary absence, even though no person be left in it. And so, if one have two mansions, and he resides sometimes with his family at one, and sometimes at the other, they are both his dwellings, and both, whether his family be there or not, are equally protected. But when the owner is so absent, there must be an intention on his part to return to his home, for if he has quitted it without any intention of returning, it has ceased to be his dwelling. And it makes no difference in such case if the owner intends to use the dwelling so left by him as his warehouse, and has some of his workmen sleep there to guard his property.²

§ 317. This privilege of the dwelling house extends to the outer door only, or to what is equivalent to the outer door, the window.³ The maxim that every man's house is to him his castle is, says Lord Mansfield, one in respect to political justice, and makes no part of the privilege of a debtor himself, and is to be taken strictly, and not to be extended by any equitable analogous interpretation.⁴ And quoting from Foster, he says, "I shall cite a very sensible and material distinction from a book in my hand, which is this: "The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant, and perhaps farther than in the scale of reason and sound policy they will warrant. But

¹ Russell on Crimes 803, 805; Roscoe on Crimes, 349.

³ Sewell 111.

⁴ Cowper 1, Lee v. Gansel.

² Russell on Crimes, 805.

in cases of life, we must adhere to rules well known and established. But this rule is not one of those that will admit of any extension. It must therefore, as I have before hinted, be confined to the breach of windows and of outer doors intended for the security of the house against persons from without, endeavoring to break in.”¹

§ 318. If there be but one tenement and one occupant of a house, what is the outer door of such house, may be readily determined. And if the landlord lets out his house as a lodging house, but occupies a part of it himself, it is still one dwelling.² If different parts of a house are occupied by different families, having one common hall and one common entrance, such hall door is the outer door of the house.³ Where a house stood over a stable, in a stable yard, surrounded by a wall, and there was a hatch gate at the foot of the stairs which led to an open gallery, from which there were doors to the several apartments; and at the top of the stairs was a door across that part of the gallery which led to the chamber where the plaintiff was; this last door was held to be the outer door of the plaintiff's house, and that the breaking into the same, after having gained admission into the yard was unlawful. Where the owner let out his house, but reserved to himself an inner room, which he occupied separately, and an officer having process against him, entered the outer door when it is open, it was held that he might break open the inner door of the defendants' apartment to come at him.⁴

§ 319. But if the whole house is let out to lodgers, and the owner does not inhabit any part of it, though there is but one door, common to all the inmates, yet, each separate apartment, occupied separately, is a distinct mansion, and the outer door of such separate apartment is the outer door of such mansion.⁵

§ 320. When the officer is once within the walls of the house, by having entered peaceably and lawfully at the outer door; or where he has lawfully entered in the pursuit of a prisoner who has broke away from an arrest, he may lawfully break open every inner door; and the door or doors of a lodger, a window, box, chest or drawer, necessary to the execution of his process, or the retaking of his escaped prisoner.⁶

§ 321. But if an arrest has actually been made, and the person arrested escape, and take refuge in his dwelling house, it is not a protection to him, even on civil process, and the officer in pursuit may

¹ Cowper 1, Lee v. Gansel.

² Sewell, 111; 5 John. 352, Williams v. Spencer.

³ Allen 423.

⁴ 5 John. 352, Williams v. Spencer; 17 John. 121, Hubbard v. Mack.

⁵ Sewell 110.

⁶ Cowper 1, Lee v. Gansel; Allen 109; 4 Taunt. 626, Hutchinson v. Birch; 17 John. 127, Hubbard v. Mack; 6 Hill 597, Glover v. Whittenhall; 4 Blackf. 18, (n. 1) McGee v. Givan.

break in and retake him.¹ And even where the arrest is made by the officer putting his hand through an open window, and touching the defendant; or where the defendant's hand is out of the window, and the officer seizes it, he may break open the outer door to come at such prisoner.² And if the sheriff has seized the defendant's property on execution one day, and he returns the next to complete his inventory, on making known his business, and demanding admittance, he may, if it be refused, break the outer door.³ And if the arrest is made in the house, and the officer is thrust out of it, he may break in without demand and refusal upon an immediate return with assistance.⁴ And if the sheriff after a peaceable entrance by the outer door of a house, be locked in, he may break such outer door to obtain his liberty.⁵ And so too, if his officer, after having obtained peaceable entrance, is locked in, he may break open the outer door to release him.

§ 322. But it is the defendant's own dwelling which, by law, is said to be his castle. For the house of one is not a castle, or privilege, but for himself and his family, and to his own proper goods, or to those which are lawfully and without fraud or covin there. And therefore, the house will not protect any person who flies there.⁶ or the goods of another which are brought and conveyed into the house, to prevent a lawful execution, and to escape the ordinary process of law. And the owner of the house cannot refuse admittance to the officer, on proper demand, and the making known his business. And if he does so refuse, the officer may break open the door to effect his purpose. But he ought to be very certain that the defendant or his goods are secreted within before he resorts to a forcible entry. If entrance into a dwelling is illegally obtained by breaking or forcing the outer door or window or the like the officer is not only a trespasser, but the arrest or seizure of the goods will be void.⁷

§ 323. If the defendant, when arrested, refuse to give bail, or be unable to do so, the officer must detain him in custody, and commit him forthwith to jail. When the arrest is under the code, the defendant may give bail at any hour of the day or night, and shall have reasonable opportunity to procure it before being committed to prison.⁸ In Massachusetts it has been held that the officer cannot hold him against his consent in order to procure an interview with the

¹ Allen 109; 6 Mod. 173, Genner v. Sparks; Sewell 110; 6 Hill 597, Glover v. Whittenhall.

² 6 Mod. 173, Genner v. Sparks.

³ 6 Hill 597, Glover v. Whittenhall.

⁴ 10 Wend. 300, Allen v. Martin.

⁵ Watson 59.

⁶ 3 Black. Com 258.

⁷ 12 Pick. (Mass.) 270, Illsley v. Nichols; 24 Wend. 369; The People v. Hubbard; 47 N. H. 482, Closson v. Morrison.

⁸ Code, § 186.

creditor or his attorney, for the purpose of negotiating with the debtor, or for the purpose of the creditor giving further directions to the officer as to the service of the execution. And if the plaintiff direct the arrest on the execution, but not to commit him until further orders, the officer is justified in not arresting him.¹ Though he refuse to give bail on his arrest he is entitled, in such case, to the liberties of the jail, on executing a proper bond for that purpose.

§ 324. If while the defendant is in custody any otherailable writ or order for arrest, be lodged with the sheriff, the officer is bound, at his peril, to detain him until he be regularly discharged from this second writ or order.² But if the first arrest was made without process, or on void process, or after it was returnable, or while the defendant was privileged from arrest or the like, he cannot be detained by virtue of any subsequent process, however regular, unless such subsequent process be at the suit of another plaintiff, and without collusion with the party who caused the first arrest,³ or the sheriff.⁴ In all such cases, the court will discharge him from arrest and detention upon such second process.

§ 325. When a sheriff or other officer shall arrest any person by virtue of any mesne or final process, or by virtue of any other civil process, he shall not charge such prisoner with any sum of money, or demand, or receive from him any sum of money, or any valuable thing, for any drink, victuals or other thing, whatsoever, furnished or provided for such officer, or for such prisoner, at any tavern, ale house or public victualling or drinking house. And no sheriff or officer who shall have arrested any person, shall while such person is in custody, demand or receive any gratuity or reward, upon any pretence whatever, for keeping such prisoner out of jail, or for waiting for such prisoner to find bail or agree with his adversary, or for waiting for any other purpose.⁵

§ 326. The same rule in reference to the treatment of a prisoner on arrest in criminal cases, applies to arrests in civil matters.⁶ The sheriff must not beat, or strike or assault him. But if the prisoner draws a weapon, the officer may justify an assault and battery.⁷

CHAPTER XVIII.

ARREST AND BAIL. ^a

§ 327. By the provisions of the Code of Procedure an order for

¹ 1 Metcalf 502, French v. Bancroft.

² Sewell 108.

³ Graham's Pr. 14.

⁴ Sewell, 130.

⁵ Ante, § 67.

⁶ Sewell 106.

⁷ Code, § 178.

^a Ala.—R. C. 1867, §§ 2574.

Ark.—Dig. 1858, p. 656.

the arrest of a defendant has been substituted for the writ of *capias ad respondendum*. And it is declared that no person shall be arrested in a civil action, except as provided by the said Code; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempts.¹ It has also been determined that it does not abolish the writ of *ne exeat*.²

§ 328. An order for the arrest of a defendant must first be made by a judge of the court in which the action is brought, or by a county judge.³ If the action be against one for usurping any office, and the defendant is charged with receiving fees or emoluments belonging to the office, the order for arrest must be granted by a judge of the supreme court.⁴ The order for the arrest may be made to accompany the summons, and be served therewith, or it may be made and served at any time afterwards, before judgment.⁵

§ 329. The order shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or indorsed.⁶ It will be seen hereafter that the bail to be taken on the arrest of a defendant in an ordinary action, will differ greatly from that required upon an arrest made under the third subdivision of the one hundred and seventy-ninth section of the Code, concerning actions to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found, or with the intent to deprive the plaintiff of the benefit thereof. In the ordinary case of converting property, or detaining it in hostility to the claims of the true owner, the condition of the undertaking will be that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to

¹ Code, § 178.

² Post, *Ne exeat*.

³ Code, § 180.

⁴ Code, § 435.

⁵ Code, § 183.

⁶ Code, § 183.

Cal.—Dig. 1860, p. 176.

Ga.—Dig. p. 636.

Ill.—1 St. 236; 240.

Ind.—R. S. 1852, p. 50.

Kan.—Gen. St. 1868, p. 656.

Mass.—St. 1860, pp. 632, 642.

Mich.—St. 1857, p. 1138.

Neb.—R. S. 417.

Nev.—St. 1869, p. 207.

N. H.—Gen. St. 1867, p. 420.

N. C.—Rev. Code, 105.

O.—2 R. S. 991.

On.—Gen. L. 166.

Penn.—Dig. 1861, pp. 33, 36.

R. I.—R. S. 435; Laws 1868, p. 122.

S. C.—Code, p. 466; Laws 1868, p. 122.

Va.—Code 1849, p. 270.

Vt.—Gen. St. 1863, p. 297.

such as may be issued to enforce the judgment therein.¹ But the undertaking on an arrest, under the said third subdivision, must be conditioned for the payment to the plaintiff of such sum as may, for any cause, be recovered against the defendant.² Usually the order does not indicate under which subdivision the same was granted, and it is left for the sheriff to determine this fact from the affidavit. And it is very important that he should do so correctly. To warrant the holding to bail in the latter case, the affidavit must show that the property sought to be recovered was removed after suit brought, with intent to prevent its being taken or found by the sheriff, or with intent to deprive the plaintiff of the benefit thereof; or if the disposition or removal took place before the suit was brought, it must appear to have been done with intent to render ineffectual the proceedings in a suit, which the defendant knew, or had reason to apprehend the plaintiff intended to bring to recover possession of the property.³ It has been held that an order to hold the defendant to bail in a specific sum under the third subdivision of section one hundred and sixty-nine will be sufficient, and that on the defendant's tendering such bail the sheriff will be bound to discharge him.⁴

§ 330. The affidavit upon which the order of arrest is granted, as well as the order of arrest, shall be delivered to the sheriff, to whom such order is directed.⁵ It is usual also for the attorney to prepare and deliver to the sheriff a copy of such affidavit and order, at the time of the delivering to him of the order for execution, to be delivered by him to the defendant, on being arrested. If the attorney does not prepare and deliver such copies to the sheriff it will be the duty of the latter to prepare them himself.

§ 331. The sheriff to whom such order is directed and delivered for execution, shall, if the same is in due form, and is not void upon its face for want of jurisdiction in the officer who grants it,⁶ execute the order by arresting the defendant, and keeping him in custody until discharged by law; and may call the power of the county to his aid, in the execution of the arrest, as in case of process.⁷ Such arrest must be made if the defendant can be found in the county on or before the time fixed in said order for the return of the same. The manner of making the arrest, as well as the times and places in which it may be done, has already been pointed out.⁸ On making such arrest the sheriff shall deliver to the defendant a copy of the

¹ Code, § 187.

² Code, §§ 187, 211.

³ 8 How. 111, *Mulvey v. Davison*; 3 Sandf. S. C., 707, *Roberts v. Randall*.

⁴ 50 Barb. 70, *Tracy v. Griffin*.

⁵ Code, § 184.

⁶ Ante, §§ 282, &c.

⁷ Code, § 185; Ante § 36.

⁸ Ante, §§ 28, &c.

original affidavit on which the order was granted, and also a copy of the order.¹

§ 332. If upon such arrest being made, the defendant will not give the undertaking in the amount mentioned in the order, or does not make the deposit hereinafter mentioned, in lieu of bail, it will be the duty of the sheriff forthwith to convey him by the most direct route, to the jail of the county, there to detain him until he gives the undertaking required, or makes the necessary deposit, or gives the proper bond for the liberties of the jail.

§ 333. At any time after the arrest, and before execution issues, the defendant shall be discharged from such arrest, either by giving bail or depositing the amount mentioned in the order of arrest.² The defendant may give bail whenever arrested, at any hour of the day or night, and shall have reasonable opportunity to procure it before being committed to prison. Such bail may be given by causing a written undertaking to be executed by two or more bail, stating their places of residence, and occupations, (each of whom must be a resident and householder or freeholder within the state, and worth the amount specified in the order, over and above all debts and liabilities, and exclusive of property exempt from execution,³) conditioned that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein⁴. Such undertaking is bail for appearance to answer the process of the court, and is the substitute for bail under the former practice.⁵ It is the sheriff's duty to prepare the bond or undertaking. The sheriff should, before receiving any such undertaking, require the parties thereto, to justify either before himself, or any officer authorized to take affidavits to be read in the court in which the proceedings are commenced; and then that the sureties acknowledge, or that the subscribing witness thereto, if there be one, prove the same before some officer authorized to take the acknowledgment of deeds, for by the rules of the court, no such undertaking can be received or filed until the same is proved or acknowledged in like manner as deeds of real estate.⁶

§ 334. The qualifications of bail are as follows:

1. Each of them must be a resident, and householder or freeholder, within the state;
2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge

¹ Code, § 186.

² Code, § 187.

³ Code, § 187.

⁴ 2 Sandf. 707, *Roberts v. Randall*.

⁵ 15 Barb. 26, *Stewart v. Howard*.

⁶ Rule 6. Sup. Ct.

on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.¹ The sheriff, however, would seem to be authorized to take two sureties only, each of whom should be worth the requisite sum. He must in a proper case take bail, provided the sureties offered are unexceptionable and sufficient. Any person having the qualifications mentioned may be bail on arrest on any such order, who is of lawful age, except persons legally incapacitated from acting, as a married woman, or an idiot, a person declared to be of unsound mind, or an habitual drunkard, for whom a committee has been appointed; and attorneys, their partners and clerks, whether they be the attorneys in the action or not; sheriffs and their deputies, turnkeys and jailers, and persons of infamous character.²

§ 335. The sheriff need not personally arrest the defendant before taking bail, for it will be good, though no arrest be made.³ So it may be taken before the writ or order is delivered to the sheriff for execution, but not before it is issued.⁴ And it may be taken any time before execution.⁵ The sheriff may discharge the defendant from arrest on mesne process without bail, if he have him before process against the person of the defendant is issued. But if he does so discharge him and he has him not at such time, it is an escape and he will be liable as bail.

§ 336. Although the bail taken by the sheriff must be in the form prescribed, yet a bond to the plaintiff is good. So any other contract or undertaking in writing to the plaintiff, for the defendant's appearance, will be valid, and if such an undertaking be given by the defendant's attorney, which is usual in practice, the court will in general enforce it by attachment. It must, however, be to the plaintiff by name, or to his attorney for him, and not to the sheriff, otherwise the court will not enforce it.⁶

§ 337. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody; and the sheriff shall, within four days after the deposit, pay the same into court; and shall take from the officer receiving the same, two certificates of such

¹ Code, § 194.

² 15 John. 535, *Coster v. Watson*; 20 John. 129, *Bailey v. Warden*; Cowper 828, *Bologne v. Voutrain*; 1 Wend. 35, *Craig v. Scott*; 4 Term 440, *The King v. Edwards*.

³ *Graham's Pr.* 145.

⁴ *Watson*, 88.

⁵ Code, § 186.

⁶ *Graham's Pr.* 147; 16 N. Y. 443, *Decker v. Judson*.

payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency. At any time before judgment, bail may be substituted for the deposit, and the judge before whom the justification is had, shall direct in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.¹

§ 338. Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return indorsed, with a certified copy of the undertaking of the bail. The plaintiff within ten days thereafter, may serve upon the sheriff, a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.²

§ 339. On the receipt of notice that the plaintiff does not accept the bail, the sheriff or defendant may within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail, (specifying the places of residence and occupations of the latter,) before a judge of the court or county judge, at a specified time and place; (which must be within the county where the arrest was made, or the bail reside,) and the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking in the form mentioned. For the purpose of justification, each of the bail shall attend before the judge at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, in his discretion may think proper. The examination shall be reduced to writing and subscribed by the bail, if required by the plaintiff. If the judge find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk of the court in which the action is pending; and the sheriff shall thereupon be exonerated from liability. If the security fail to justify at the time, the court or judge thereof, or a county judge, may grant further time for them to justify.³

§ 340. Bail shall not be liable upon their undertaking, taken upon an arrest in any case except under the provision of the third subdivision of section one hundred and seventy-nine of the code, until,

¹ Code, § 197-199.

² Code, § 192; 8 How. 353, *The Col. Ins. Co. v. Force*.

³ Code, §§ 193, 195, 196; Rule 5, Sup. Ct.

1. An execution against the property of the defendant shall have been issued to the sheriff of the county in which such defendant was originally arrested, and the same shall have been returned by such sheriff unsatisfied, in whole or in part; and,

2. An execution against the body of the defendant, having at least fifteen days between the teste and return day thereof, shall have been issued to the same sheriff, and by him returned, that the defendant could not be found in his county. Upon any such execution being issued and delivered to the sheriff, it shall be his duty to use all reasonable endeavors to execute the same, notwithstanding any directions he may receive from the plaintiff or his attorney. And in an action against the bail, they may plead that executions against the property and against the body of the defendant in the original suit, were not issued as herein directed; or that they were not issued in sufficient time to enable the sheriff to execute the same; or that directions were given by the plaintiff or his attorney to prevent the service of the said writs, or either of them; or that any other fraudulent or collusive means were used to prevent such service; and if any such defence be established, it shall entitle the bail to a verdict.¹

§ 341. The bail may be exonerated either by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such farther time as may be granted by the court.² The bail will also be relieved where the defendant was not liable to arrest.³ And where the defendant has been discharged under the insolvent laws, the bail will be released; and in such case the court will not inquire into the regularity of the discharge.⁴ So too, they will be discharged if the plaintiff gives time to the principal. When bail is exonerated on payment of costs, they must seek the plaintiff, and pay them, without demand or presentment of the bill.

§ 342. At any time before a failure to comply with their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered

¹ 3 R. S. 665, §§ 31-33; 7 Wend. 352, Bradley v. Bishop; 17 Wend. 316. Bishop v. Earl.

² Code, § 191.

³ 9 Wend. 462, Russel v. Champion; 22 Wend. 612, White v. Blake.

⁴ 9 Wend. 431, Russel v. Packard; 21 Wend. 670, Trumbull v. Healey.

⁵ 10 John, 587, Rathbone v. Warren; Graham's Pr. 443.

to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender ;

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court, or county judge, may, upon a notice to the plaintiff, of eight days with a copy of the certificate, order that the bail be exonerated ; and on filing the order, and the papers used on such application, they shall be exonerated accordingly. But this shall not apply to an arrest, for the cause mentioned in subdivision three of section one hundred and seventy-nine of the Code, so as to discharge the bail from an undertaking given to the effect provided by section two hundred and eleven of the Code.¹

§ 343. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him, or by written authority endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion, to do so.² The rights and powers of the bail are the same in civil as in criminal cases ; and they may seize the defendant in the same manner and times and places in the former as in the latter case.³ And they may surrender him though they have not justified, and it is not necessary that all the bail should unite in the surrender.⁴

§ 344. If, after being arrested, the defendant escape, and is not retaken by the sheriff, or be rescued, or bail be not given or justified, or the signature of the surety is forged,⁵ or a deposit be not made instead of bail, the sheriff shall himself be liable as bail.⁶ But he may discharge himself from such liability by the giving and justification of bail as required to be taken on the arrest, at any time before process against the person of the defendant to enforce an order or judgment in the action,⁷ which bail may surrender the defendant without justifying.⁸ And it has been held in two late cases in the New York common pleas, that where the sheriff's liability becomes fixed as bail in any of the above cases, he has all the rights of bail. He may retake the defendant if he choose, as bail, without farther process, and without putting in bail, in the same manner as bail may do ; and he may be released or exonerated from such liability in the same cases and in the same manner as bail. If the defendant escape, the sheriff may retake him by virtue of the original arrest, at any time, before the return day of the order, whether the escape be voluntary or

¹ Code, § 188.

² Code, § 189.

³ Ante, §§ 132-134.

⁴ 7 How. 212, *In Re Taylor* ; 1 Metcalf 497, *Marsh v. Bancroft*.

⁵ 31 Barb. 62, *Metcalf v. Stryker*.

⁶ Code, § 201.

⁷ Peake's N. P. 169, *Rex v. Butcher*.

⁸ 2 Strange 867, *Burchere v. Colsen*.

negligent. But if the escape be negligent, that is, if it occurred without the knowledge or assent of the officer, then he may retake him by virtue of such original arrest, at any time, whether before or after the return day, in the same manner and time and places as bail may take their principal.¹ The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.²

§ 345. Where an order is made for the arrest of the defendant, under the third subdivision of section one hundred and seventy-nine of the Code, in a case where property is sought to be recovered, which is claimed to be unjustly detained, and where it or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof, if the defendant is arrested, the undertaking shall be conditioned for the delivery of the property to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause be recovered against the defendant.³ The bail in this case is virtually for any judgment the plaintiff may recover in the transaction.⁴ And the bail cannot be exonerated from their liability under the provisions of section one hundred and eighty-eight of the Code, relative to the surrender of a defendant on arrest.⁵ It has been held that the order of arrest may be in a specified sum.⁶

§ 346. Within ten days after the arrest, the sheriff shall file the original affidavits on which the order of arrest was made, with the clerk of the court where the action is pending.⁷

§ 347. After the bail bond or undertaking is executed, or a deposit in lieu of bail is made, or the sheriff has received written authority from the plaintiff for the defendant's discharge, he should then search for detainers for him, or whether similar process be then in the hands of his deputies; and if there be none, he should discharge him from custody, on payment of the fees for the bail bond. And the sheriff is allowed a reasonable time to search for detainers, before he so discharges the defendant. And he may detain the defendant until his fees are paid, but the plaintiff's attorney has no lien upon the defendant for his costs.⁸

¹ Ante, § 137.

² Code, § 203; 44 Barb. 9, *Clapp v. Schutt*.

³ Code, §§ 187, 211.

⁴ 3 Sandf. S. C. 707, *Roberts v. Randall*.

⁵ Code, § 188.

⁶ 50 Barb. 70, *Tracy v. Griffin*.

⁷ Rule 4 Sup. Ct.

⁸ Sewell 171; *Watson* 103

CHAPTER XIX.

OF THE SERVICE OF THE SUMMONS. ^a

§ 348. The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action.¹ As any person may serve the summons, a sheriff may do so in any place within the state, whether within his county or beyond its limits; but in such last case he acts as a private individual and the proof of service must be the same as where such service is made by a private individual.²

§ 349. The service shall be made, and the summons returned, with proof of such service to the person whose name is subscribed thereto, with all reasonable diligence.³ And the person subscribing the summons, may, at his option, by indorsement thereon, fix a time for the service thereof, and the service shall be made by the officer accordingly.⁴ If the sheriff fails to make return of service of the summons, by the time fixed thereon within which such service shall be made, or within a reasonable time, if no such time is so fixed, he may be proceeded against as in other cases of neglect to make due return of process.⁵

§ 350. The service may be made at the same time and places as any other process in civil cases.⁶ But in making the service the officer has no more power than any individual. He may enter the defendant's house in the day or the night time to make the service, peacefully if he can, but he has no right to enter forcibly or against the owner's wishes.

§ 351. The summons shall be served by delivering to, and leaving with the person served,⁷ a copy thereof as follows:

1. If the suit be against a corporation, to the president or other

¹ Code, § 133; 5 How. 341, *Litchfield v. Burwell*.

² Ante § 47; 17 How. 477, *The Farmers' L. & Tr. Co. v. Dickson*.

³ 10 Wend. 572, *Anon.*

⁴ Code, § 133.

⁵ Ante, § 40.

⁶ Ante, Chs. 5, 16.

⁷ Rule 8, Sup. Ct.

^a Ala.—R. C. 1867, § 2564.
Cal.—Dig. 1860, p. 170; Laws 1861, p. 496.
Conn.—Rev. 1866, pp. 1, 4.
Fa.—Dig. 1847, p. 325.
Ill.—1 St. 241.
Ind.—R. S. 1852, p. 35.
Ia.—Rev. 1860, p. 498.
Kan.—Gen. St. 1863, p. 640.
Mass.—St. 1860, 622.
Minn.—Rev. 1866, p. 466.

Mo.—Gen. St. 654.
Neb.—R. S. 404.
Nev.—St. 1869, p. 200.
N. H.—Gen. St. 1867, 413.
O.—2 R. S. 962; Sup't R. S. 542.
On.—Gen. L. 150.
Penn.—Dig. 1861, 30.
S. C.—Code pp. 456, 520.
Vt.—Gen. St. 1863, p. 289.
Wis.—R. S. 718.

head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein; or when such service shall be made within this state personally upon the president, treasurer or secretary thereof.¹ And the managing agent must be one whose agency extends to all the transactions of the company; one who is engaged in the management of the corporation in distinction to the management of a particular branch or department of its business. This however must be understood as having reference to the regularity of the proceedings in the action, and not as to the duty of the sheriff, in the service of such process. If any summons against a corporation be delivered to him for service, it will be his duty to make the best service that he can under the circumstances, and make return thereof according to the fact.² All process and papers for the commencement of actions or legal proceedings against the corporation of the city of New York shall be served either on the mayor, comptroller or the counsel for the corporation.³ In all legal proceedings against boards of supervisors, the first process and all other proceedings required to be served, shall be served on the chairman or clerk of the board;⁴

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed;

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed, to such committee and to the defendant personally;

4. In all other cases to the defendant personally;⁵

5. If the defendant resides in this state, the officer shall make proper and diligent effort to serve such process upon him, and if he cannot be found, or if found, avoids or evades service, such officer shall make return that proper and diligent effort has been made to serve such process on the defendant, and that such defendant cannot be found, or avoids or evades such service, so that the same cannot be made personally by such proper diligence and effort;⁶

¹ Code, § 134; 49 Barb. 149, *Curtis v. The Avon & Mt. M. R. R.*

² 4 How. 275, *Hulbert v. The Hope Ins. Co.*; 5 How. 183, *Brewster v. The Mich. C. R. R. Co.*

³ 4 R. S. 764, § 4.

⁴ 1 R. S. 901, § 3.

⁵ Code, § 134.

⁶ 3 R. S. 739, § 100.

6. If an order shall be made under the statute directing the mode of serving the summons upon any defendant in the case last mentioned, the same shall be served by the officer in the manner pointed out by such order.¹

§ 352. Every insurance and other corporation created by the laws of any other state, doing business in this state, shall, within thirty days after the passage of this act, designate some person residing in each county where such corporation transacts business, upon whom process issued by authority of, or under any law of this state, may be served, and within the time aforesaid shall file such designation in the office of the secretary of state; and a copy of such designation, duly certified by said officer, shall be evidence of such appointment. And it shall be lawful to serve on such person so designated, any process issued as aforesaid; such service shall be made on such person in such manner as shall be prescribed in case of service required to be made on any resident of this state, and such service shall be deemed to be a valid service thereof. In all cases where such designation shall not be made as aforesaid and such foreign corporation cannot be served with such process according to the present provisions of law, it shall be lawful to serve such process on any person who shall be found within this state acting as the agent of said corporation, or doing business for them. Service made in accordance with any provision of said act, shall be as effectual as if made in the form and manner required by law, and shall be deemed a full compliance with any statute requiring personal or other service to be made. The term "process," in said act, shall be held and deemed to include any writ, summons or order whereby any action, suit or proceeding shall be commenced, or which shall be issued in or upon any action, suit or proceeding, by any court, officer or magistrate.²

§ 353. The proof of service of a summons and of the complaint or notice, if any accompany the same, must be as follows:

1. If served by the sheriff within his county, his certificate thereof; or,
2. If served by any other person, or if served by the sheriff out of his county, the affidavit of the person serving; or,
3. The written admission of the defendant.

Such certificate, affidavit or admission must state the time and place of the service; upon whom served, and how served, and it must also show in what action the service was made. If the certifi-

¹ Ante, § 289.

² 3 R. S. 874, §§ 1, 2, 3, 4.

rate, affidavit or admission is indorsed upon the summons, or annexed thereto, it will be sufficient to refer to it for the title of the cause; but if there be no copy, then the title of the cause, with the name of the court should be given. When such service is made by any other person than the sheriff within his county, it shall be necessary for such person to state in his affidavit of service, when, and at what particular place he served the same, and that he knew the person served to be the person mentioned and described in the summons, as defendant therein, and also state in his affidavit, whether he left with the defendant such copy, as well as delivered it to him.¹ In the case of a defendant who cannot be found, the proof of the failure to serve may be by certificate or affidavit of the officer; but the proof of the service of the papers in the manner prescribed by the court or judge must be by affidavit.²

CHAPTER XX.

CLAIM AND DELIVERY OF PERSONAL PROPERTY. *a*

§ 354. Where personal property of one is wrongfully detained by another, the plaintiff in an action to recover the possession may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, in the manner hereinafter mentioned.³

§ 355. Where a delivery is claimed, an affidavit must be made by the plaintiff, or some one on his behalf, showing,

1. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief;

¹ Code, § 138; Rule 18 Sup. Ct.; 5 How. 341, *Litchfield v. Burwell*.

² 3 R. S. 739, § 100; Ante, § 289.

³ Code, § 206.

a Ala.—R. C. 1867, §§ 2593, 2964.

Ark.—Dig. 1858, p. 900.

Conn.—Rev. 1866, p. 75.

Fa.—Dig. 1847, p. 387.

Ill.—1 St. p. 226.

Ia.—Rev. 1860, p. 640.

Ind.—R. S. 1852, p. 54.

Kan.—Gen. St. 1868, p. 661.

Me.—R. S. 585.

Mass.—St. 1860, p. 730.

Mich.—St. 1857, 1330.

Minn.—Rev. 1866, p. 466.

Mo.—Gen. St. 1865, p. 663.

Neb.—R. S. 421.

Nev.—St. 1867, p. 455.

N. J.—Laws 1862, p. 111.

N. C.—Rev. Code 501.

O.—2 R. S. 996.

On.—Gen. Laws, 171.

R. I.—R. S. 519.

S. C.—Code, p. 470.

Tenn.—Code, p. 624.

Vt.—Gen. St. 1863, p. 318.

4. That the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff, or any of them;¹ or if so seized, that it is, by statute, exempt from such seizure; and

5. The actual value of the property.²

§ 356 The plaintiff or his attorney may, thereupon, by an indorsement in writing, upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.³

§ 357. The plaintiff shall also cause to be executed an undertaking by one or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause be recovered against the plaintiff.⁴ The sheriff should, in all cases require the sureties to any undertaking he is required to receive or approve in these proceedings, whether given by the plaintiff or the defendant, to make the usual affidavit of justification, and acknowledge the undertaking in the same manner as deeds of real estate are acknowledged, before he receives or approves the same.⁵

§ 358. Such affidavit and indorsement thereon, with the undertaking, together with copies of each of such papers, shall be delivered to the sheriff. If he is of the opinion that the sureties named in the undertaking are sufficient, he shall indorse his approval thereof upon such undertaking, and shall make the copy thereof correspond thereto. The sheriff has no right to dispense with the undertaking.⁶

§ 359. On receiving such papers, and after he has so approved of the sureties in the undertaking, the sheriff shall forthwith take the property described in the affidavit, if it be within his county, and be in the possession of the defendant or his agent. If it has passed out of the possession of the defendant or his agent, the sheriff will not be justified in taking it. If such property or any part thereof be concealed in a building or enclosure, the officer shall publicly demand its delivery; and if it be not delivered he shall cause the building or enclosure to be broken open, and take the property into his possession, and if necessary, he may call to his aid the power of the county.⁷ The sheriff shall also, without delay, serve on the defendant, a copy of the affidavit, notice and undertaking, by delivering the same to

¹ 43 Barb. 187, *Smith v. Oser*.

² Code, § 207.

³ Code, § 208.

⁴ Code § 209.

⁵ Rule 6 Sup. Ct.

⁶ 1 Code, § 209; 18 Wend. 581 *Wilson v. Williams*; 1 Code Rep. 62.

⁷ Ante, § 36.

him personally, if he can be found; or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either such agent or defendant, with some person of suitable age and discretion. When the sheriff seizes such property he shall keep it in a secure place, and retain it in his custody until it is determined, as hereinafter mentioned, who is entitled to the possession of the same.¹

§ 360. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail upon arrest.² And the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above mentioned, or until they shall justify, or new sureties shall be substituted and justify. If the defendant excepts to the sureties he cannot reclaim the property as hereinafter mentioned.³

§ 361. At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return of the property upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendants, it shall be delivered to the plaintiff, unless it be claimed by a third person as mentioned in the two hundred and sixteenth section of the Code.⁴

§ 362. The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge of the court or a county judge in the same manner as upon bail upon arrest; upon such justification the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time, but if they or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.⁵ The qualifications of sureties and their justification shall be as are prescribed

¹ Code §§ 209, 215; 27 N. Y. 234, *Moore v. Westervelt*.

² Ante § 339.

³ Code, § 210.

⁴ Post, § 363; 18 How. 376, *Graham v. Wells*.

⁵ Code, § 212.

by sections one hundred and ninety-four and one hundred and ninety-five of the Code, in respect to bail upon an order of arrest.¹

§ 363. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent, shall be valid against the sheriff unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.²

§ 364. The sheriff shall in all cases, unless the matter is sooner adjusted by the parties, retain the property in his possession until the expiration of three days from the time of taking the same, and the service of notice to the defendant. If at the expiration of such three days, neither the defendant nor any other person has claimed a delivery of such property, the sheriff shall deliver the same to the plaintiff, and not before. And so it shall be delivered to the plaintiff, where the defendant has in due time claimed a redelivery of the property, if his sureties or others in their place fail to justify at the time and place appointed. But if the defendant's sureties have justified on notice to the plaintiff, or if justification is expressly waived, the sheriff shall then redeliver such property to such defendant. When the property is claimed in due form by another person, the sheriff may retain it a reasonable time to demand indemnity from the plaintiff. If such plaintiff refuse to give such indemnity, the sheriff may release the possession of the property. When the plaintiff or defendant is entitled to the possession of the property as aforesaid, the sheriff shall deliver the same to him on receiving his fees for taking the same, and his necessary expenses for keeping such property.³

365. The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned herein.⁴ And the undertakings given shall, after the justification of,

¹ Code, 213; Ante, § 339.

² Code, § 216.

³ Code, §§ 211, 212, 215, 216; 21 How.

354, *Grant v. Booth*; 18 How. 376,

Graham v. Wells.

⁴ Code, § 217.

the sureties, be delivered by the sheriff to the parties respectively for whose benefit they are taken.¹

CHAPTER XXI.

ATTACHMENTS. ^a

1. ATTACHMENTS AGAINST FOREIGN CORPORATIONS, NONRESIDENT OR ABSCONDING OR CONCEALED DEFENDANTS.

§ 366. In an action for the recovery of money only, or in an action for the wrongful conversion of personal property against a corporation created by or under the laws of any other state, government or country, or against a defendant who is not a resident of this state, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this state, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete any of his or its property, with intent to defraud creditors, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendant or corporation attached in the manner hereinafter mentioned, as a security for the satisfaction of such judgment as the plaintiff may recover.²

§ 367. The warrant of attachment may be obtained from a judge of the court in which the action is brought, or from a county judge.³ The warrant of the judge alone is sufficient; it does not require formal teste, signature of clerk, or seal, and no return day need be inserted,

¹ Code, § 423.

³ Code, § 228.

² Code, § 227.

^a Ala.—R. C. 1867, §§ 2927, 2928, 2958.
Ark.—Dig. St. 1858, p. 164; Laws 1867, p. 294.
Cal.—Dig. 1860, p. 182; Laws 1862, p. 568.
Conn.—Rev. 1866, pp. 1, 466; 14 Conn. 219, *Mills v. Camp*.
Fa.—Dig. 1847, p. 367.
Ga.—Code, 602.
Ill.—1 St. 228.
Ia.—Rev. 1860, p. 588.
Ind.—2 R. S. 1852, p. 62.
Kan. Gen. St. 1868 664.
Me.—R. S. 497.
Md.—Code, p. 45.
Mass. St. 1860 p. 624; 1 Pick. 338, *Budlam v. Tucker*; 7 Mass. 123, *Bond v. Ward*; 5 Met. (Mass.) 111, *Heard v. Fairbanks*; 11 Met. (Mass.) 258, *Arnold v. Stevens*; 14 Pick. (Mass.) 408, *Henmenway v. Wheeler*.

Mich.—St. 1857, p. 1268.
Minn. Rev. 1866, p. 466.
Miss.—Rev. Code, pp. 372, 549.
Mo.—Gen. St. 1865, p. 560.
Neb.—R. S. 424.
Nev. St. 1869, p. 214.
N. H.—Gen. St. 1867, p. 415.
N. J.—Dig. 1855, p. 32.
N. C.—Rev. Code, p. 91; Laws 1867, p. 12.
O.—2 R. S. 1002, 1173.
On.—Gen. Laws 174.
Penn.—Dig. 1861, pp. 553, 491.
R. I.—R. S. 437.
S. C.—Code, p. 479.
Tenn.—Code, p. 635.
Wis.—R. S. 739; 14 Wis. 88, *Bogart Adm'r. v. Phillips*.
Vt.—Gen. St. 1863, p. 239.
Va.—Code, 1849, p. 600.

but it should bear the signature of the attorney.¹ The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the sheriffs of different counties.²

§ 368. On receiving the warrant, the sheriff should mark thereon the time when the same was delivered to him for execution; and he is required to proceed thereon in all respects in the manner required by law in the case of attachments against absent debtors.³ It may be executed before the summons is served.⁴

§ 369. He shall immediately attach so much as will be necessary to satisfy the plaintiff's claim, of the real estate and personal estate of the debtor, including money, bank notes, except articles exempt from execution; and shall take into his custody all books of account, vouchers and papers relating to the property, debts, credits and effects of such debtor, together with all evidences of his title to real estate.⁵ He shall also attach any equitable interest that the defendant may have in land.⁶ Also the rights or shares which such defendant may have in the stock of any association or corporation, together with the interest or profits thereon.⁷ Partnership property may be seized under an attachment against one of several partners the same as on an execution; but only the interest of the defendant can be sold.⁸ The property of a defendant which he has fraudulently transferred, may be attached,⁹ and so may the interest of a mortgagor of chattels. But if he has not the right of possession for a definite period; that that is, if the mortgagee may take possession at any time, he has not such an interest in the goods that may be attached.¹⁰ Property rightfully in the custody of the law cannot be attached; nor money of the defendant deposited in a bank in the name of another.¹¹ Nor are letters and correspondence any of the property which the statute

¹ 12 Barb. 265, *Genin v. Tompkins*.

² Code, § 231.

³ Code, § 232; 3 R. S. 79, §§ 1, &c.

⁴ 15 How. 8, *Treadwell v. Lawlor*; 47 Barb. 452, *Corson v. Ball*; but see 28 N. Y. 659, *Kerr v. Mount*.

⁵ 3 R. S. 80, § 7; Code, § 232.

⁶ 1 Paige 519, *Lee v. Hunter*.

⁷ Code, § 234.

⁸ 7 How. 299, *Stoutenburg v. Vandenburg*; 4 Com. 513, *Oakley v. Aspin-*

wall; 11 How. 46, *Hergman v. Dettlebach*; 24 How. 284, *Abels v. Westervelt*; 43 Barb. 187, *Smith v. Orser*.

⁹ 31 N. Y. 140, *Rinckey v. Stryker*; 27 N. Y. 596, *Hall v. Stryker*; 34 Barb. 615, *Schlusell v. Willett*.

¹⁰ 23 How. 84, *Hall v. Samson*; 35 N. Y. 274, *Hall v. Samson*; 38 Barb. 178, *Farrell v. Hildreth*.

¹¹ 50 Barb. 543, *Greenleaf v. Mumford*.

authorizes to be attached.¹ Property fraudulently assigned and converted into money by the assignee cannot be attached as the debtor's property; nor can the sheriff bring an action against the assignee.²

§ 370. The attachment is not a lien upon property, either real or personal, until such property is levied on under it. When an attachment therefore is received by the sheriff, he should be certain to attach sufficient to pay the debt and costs, if the defendant has so much within the county, and if he fails to do so, where he knows that the defendant has other property than that attached, and the balance is afterwards seized under other process, he may become liable to the plaintiff for any deficiency.³ The plaintiff has no right to dictate the extent of the levy, any more than the defendant has to limit it. The plaintiff can point out the property to the sheriff and require a levy upon so much as will be sufficient. He is the judge of the amount and is responsible to both parties for the exercise of a sound and reasonable discretion in performing his duty.⁴ And he must retain the property attached in his possession until an execution is issued on the judgment, unless it is perishable property.⁵

§ 371. In order to attach the real estate of a defendant, it will not be necessary that the sheriff should go on to the land, or see it. It will be sufficient if he has a description of it, and he indorses it upon his attachment, and in his inventory.⁶ But where the property is personal property, the sheriff must attach or seize it in the same manner as on a levy on personal property under an execution, and he has the same power and authority in attaching any such property, as in making a levy.⁷ To render the seizure effectual, it must be accompanied by possession of the property. The sheriff must take the property into his custody and it must be safely kept by him.⁸ He has a special property in it while he holds the attachment, which enables him to possess it and retake it if removed from his possession and he may insure it against loss;⁹ but he cannot use it in any manner whatever beyond what is necessary to the due execution of the attachment.¹⁰ The sheriff may require a bond of indemnity before

¹ 11 How. 46, *Hergman v. Dettlebach*.

² 35 N. Y. 320, *Lawrence v. Bank of the Republic*.

³ 18 Barb. 56, *Ransom v. Halcott*; 42 Barb. 113, *Fitzgerald v. Blake*.

⁴ 42 Barb. 573, *Fitzgerald v. Blake*.
27 Barb. 463, *McKay v. Harrower*.

⁵ 7 How. 379, *Larned v. Vandenburg*; 55 Barb. 9, *Rogers v. Bonner*.

⁶ 20 How. 430, *Yale v. Matthews*.

⁷ 43 Barb. 187, *Smith v. Orser*; 41 Barb. 471, *Rhoades v. Wood*.

⁸ 24 Vt. 23, *Blodgett v. Adams*; 26 N. Y. 117, *White v. Madison*.

¹⁰ 11 How. 46, *Hergman v. Dettlebach*.

executing an attachment on goods not in the possession of the debtor, but of a person who claims them as his own.¹

§ 372. It shall be lawful for the owners or masters of any ship or vessel on board of which the goods of any nonresident, concealed or absconding debtor shall have been shipped in good faith, for the purpose of transportation, without reshipment or transshipment in this state, to any port or place out of this state, to transport and deliver such goods according to their destination, notwithstanding the issuing of any attachment against such debtor, unless the attaching creditor, his agent or attorney, shall execute a bond with sufficient sureties to any or either of the owners or masters of the vessel on board of which such goods shall be shipped, conditioned to pay such owner or master all expenses, damages and charges which may be incurred by such owners or master, or to which they may be subjected for unlading said goods from said vessel, and for all necessary detention of said vessel for that purpose. But such bond shall not be necessary where such owner or master, either before or at the time of the shipment of the goods shall have received actual information of the issuing of such attachment; nor where the owner or master of any vessel have in any wise connived at, or been privy to the shipment of such goods for the purpose of screening them from legal process, or for the purpose of hindering, delaying or defrauding creditors.²

§ 373. The execution of the attachment upon any rights, shares, interest or profits in any stock of any association or corporation, or any debts due to the defendant, or other property incapable of manual delivering to the sheriff shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association, or corporation, or the secretary, cashier or managing agent thereof, or with the debtor or individual holding such property, with a notice, showing the property levied on.³ The notice may describe the property in general terms, without specifying its precise nature and amount.⁴ Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor or individual for the purpose of attaching, or levying upon such property, such officer, debtor or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend, or any incumbrance thereon, or the amount and discription of the property held by such association, corporation or individual, for the benefit of, or debt owing to the

¹ 18 N. Y. 115, *Chamberlain v. Beller*.

² 3 R. S. 81, §§ 13, 14.

³ Code, § 235.

⁴ 54 Barb. 78, *Drake v. Goodrich*.

defendant. If such officer, debtor or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same and obedience to such orders may be enforced by attachment.¹ But the sheriff should disclose the fact that he has the attachment.²

§ 374. The sheriff shall, immediately on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers and papers taken into his custody, stating therein the estimated value of several articles of personal property, and enumerating such of them as are perishable; which inventory, after being signed by the sheriff and appraisers, shall within ten days after such seizure, be returned to the officer who issued the warrant.³

§ 375. If any of the property so seized, other than vessels, be perishable, the sheriff shall sell the same at public auction, under an order of the officer who issued the warrant, and shall retain in his hands the proceeds of such sale, after deducting his expenses, to be allowed by the officer; which proceeds shall be disposed of in the same manner as the property so sold would have been, if it had remained unsold.⁴ If the property attached be a vessel, or a share or interest therein, the officer issuing the attachment may, upon the terms mentioned and prescribed in the statute, order it to be delivered up by the sheriff; or he may order it to be sold by the sheriff making the seizure, as in the case of perishable property. And whenever a sale of perishable property, or of a vessel, or share of a vessel, shall be ordered by any officer in the cases mentioned, he shall in such order, prescribe the time, place and notice of such sale, and how the same shall be published.⁵

§ 376. If any goods or effects, seized as the property of the debtor, other than vessels, shall be claimed by, or in behalf of any other person as his property, the sheriff shall summon and swear a jury to try the validity of such claim, in the same manner and with the like effect as in case of seizure under execution. If, by their inquisition, the jury find the property of the goods and effects so seized, to be in the person so claiming them, the sheriff shall forthwith deliver them to the claimant or his agent; unless the attaching creditor shall, by bond with sufficient sureties, indemnify the sheriff for the detention of such goods and effects. In case of such indemnity, the sheriff shall detain such goods and effects to be disposed of as hereinafter directed. An

¹ Code, § 236; 50 Barb. 587, *Mechanics' & Farmers' Bank of Jersey City v. Dakin*.

² 22 How. 278, *Scheib v. Baldwin*.

³ 3 R. S. 79, § 8; Code, § 232.

⁴ 3 R. S. 80, § 9; Code, § 233.

⁵ Code, § 233; 3 R. S. 81, §§ 15-29.

notwithstanding such finding, the sheriff may refuse to deliver the property to the claimant, although no bond is delivered. This, however, will be unadvisable, and he should in such case require a bond with ample sureties to indemnify him against any action which may be brought against him for seizing such goods. If the property in such goods be found in the claimant, the costs and charges arising from such inquisition, to be allowed by the officer issuing the warrant, shall be paid by the attaching creditor; but if it be found to be in the debtor, then the costs and charges, to be ascertained in the same manner, shall be paid by the claimant. The liability of the sheriff where he seizes property which does not belong to the defendant is the same as under an execution in a similar case; and if the plaintiff directs what goods to attach, they are both liable as trespassers, if the property so taken was not the property of the defendant.¹

§ 377. The sheriff executing the warrant shall, subject to the direction of the court or judge who issued the warrant, collect and receive into his possession all debts, credits and effects of the defendant. And the sheriff may also take legal proceedings either in his own name or in the name of such defendant as may be necessary for that purpose, and discontinue the same at such time and on such terms as the court or judge may direct.² Or the actions may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars, in any one action. Such sureties shall, in all cases, when required by the sheriff, justify, by making an affidavit that each is a householder and worth double the amount of the penalty of the bond, over and above all demands and liabilities.³ If the plaintiff does not so desire to prosecute any action for the recovery of debts due to the defendant, it will be the duty of the sheriff to apply to the court or officer, for direction concerning the same. And he should not, without the express order of the court or officer, commence any legal proceedings for the recovery of any such indebtedness.

§ 378. In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose,

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel or share or interest in any

¹ Code, § 233; 3 R. S. 80, §§ 10-12; 3 Hill 386, *Batchellor v. Schuyler*; 5 Barb. 166, *The People v. Schuyler*; 16 Barb. 483, *Marsh. v. Backus*; 4 Com.

173, *The People ex rel. Kellogg v. Schuyler*.

² Code, § 232.

³ Code, § 233.

vessel, sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment ;

2. If any balance remain due, and an execution shall have issued on such judgment, he shall proceed to sell under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands ;¹ and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant ;

3. If any of the attached property of the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment, and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured ;

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment, the court may, on the petition of the plaintiff, accompanied by an affidavit setting forth fully the proceedings held by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached and there remains uncollected of the same any part thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper.

When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof.²

§ 379. If a judgment is recovered in the action, and an execution is issued thereon, it should be special, reciting the attachment, the taking of the property thereon and requiring a sale of the property ;

¹ 4 Mo. 37, *Mitchell v. Gregg*.

² Code, § 237.

and should be directed and delivered to the individual who was sheriff when the attachment issued and who attached the property; and if he has gone out of office in the mean time and a new one has been elected, it should be directed to him as late sheriff. If, in such case, it is directed to the sheriff of the county generally it will be irregular. The late sheriff, holding the attachment, cannot execute it and under it the new sheriff will have no authority to take or sell the attached property.¹

§ 380. If a foreign corporation, or absent, or absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are taken by him from the plaintiff as an indemnity for the costs of any action under the provisions of section two hundred and thirty-eight of the code, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered to the defendant or his agent, on request and the warrant shall be discharged and the property released therefrom.²

§ 381. Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court for an order to discharge the same, and if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.³ Where any party seeks to have the attachment discharged and shall have given the undertaking required by the two hundred and forty-first section of the Code, the plaintiff may, within three days after receiving written notice of the filing of such undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objections to them. When the plaintiff excepts the sureties and shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties and may retain possession of the property attached and the proceeds thereof in his hands until the objections to them is either waived as above provided, or until they shall justify or new sureties shall be substituted and justify.⁴

§ 382. When the warrant shall be fully executed or discharged the sheriff shall return the same with his proceedings thereon, to the court in which the action is brought.⁵

§ 383. The sheriff shall be entitled to the same fees and compen-

¹ 27 Barb. 463, *McKay v. Harrower*.

² Code, § 239.

³ Code § 240.

⁴ Code, § 241.

⁵ Code, § 242

sation for services, and the same disbursements, on executing an attachment as are allowed by law for like services and disbursements under the provisions of chapter five, title one of part two of the Revised Statutes; provided, however, that no poundage or other compensation shall be allowed to the said sheriff (except his fee of fifty cents for making the levy and such compensation for his trouble and expenses in taking possession of and preserving the property, as shall be fixed by the officer issuing the attachment), unless a settlement shall be had or a judgment shall be recovered and collected in whole or in part in the action in which the attachment shall have issued. And when a judgment shall have been recovered and collected in part only, the amount of his poundage shall not be estimated upon any sum greater than the sum collected upon such judgment. And when a settlement shall be had, the amount of his poundage shall not be estimated upon any sum greater than the amount at which said settlement is made.¹

2. ATTACHMENT AGAINST ABSCONDING, CONCEALED OR NONRESIDENT DEBTORS.

§ 384. The warrant of attachment in proceedings under the provisions of the Revised Statutes may be issued by justices of the supreme court, county judges, recorders of cities; and if in the city of Schenectady, by the mayor thereof.² Such warrant may be issued to the sheriff of every county in which any property of the defendant may be.³ And under it the sheriff shall attach all the estate, real and personal, of the debtor, except such articles as are exempt by law from execution, with all books of account vouchers and papers relating thereto, and not sufficient merely, to satisfy the plaintiff, as in similar cases under the provisions of the Code.⁴ And he shall take possession of the same, and make and return an inventory thereof, in the manner already pointed out;⁵ and he may, under the direction of the officer, collect, receive and take into his possession all debts, credits and effects of such debtor, and commence such suits and take such legal proceedings in the name of the debtor, as may be necessary for that purpose.⁶ And so if the property be perishable, or consist of vessels, or be claimed by another, or be shipped on board a vessel, to any port or place out of this state, the same proceedings shall be had as in similar cases under the provisions of the Code.⁷ If, after the issuing of any warrant of attachment against any debtor,

¹ Code, § 243.

² 3 R. S. 109, § 1.

³ 3 R. S. 79, § 6.

⁴ 3 R. S. 79, § 6; Ante, § 369.

⁵ Ante, § 374.

⁶ Ante, § 377; 3 R. S. 80, §§ 7, 8.

⁷ 3 R. S. 80, §§ 9, &c.; Ante, §§ 372, 375

any other warrant shall be issued pursuant to the foregoing provisions, and shall be levied upon any property of such debtor, such subsequent warrant and seizure shall be deemed to be a part of the proceedings upon the first application, in the same manner as if such subsequent warrant had been issued by the officer who granted the first warrant. And the officer who issued the first warrant shall, on the application of any creditor, subscribe and deliver to him a notice in writing, directed to the sheriff having such subsequent warrant, of the fact of a prior warrant having issued; and upon such notice being served upon such sheriff, he shall return to such officer an inventory of the property seized by him, under such subsequent warrant, with all his proceedings thereon, in the same manner as if the same had been issued by such officer; and all proceedings on the subsequent warrant shall be conducted in all respects, as if the same had been issued by the officer who issued the first warrant.¹ Upon the appointment of trustees being made, every sheriff to whom any warrant against the estate of such debtor may have been issued, shall return the same, with his proceedings thereon, to the officer who issued the same, or to the officer who issued the first warrant against such debtor, in case warrants shall have been issued by several officers; and such officer shall cause the same to be filed within thirty days thereafter, in the office of a clerk of the supreme court.² And such sheriff may be compelled to return such warrant, or the inventory required to be taken by him, by an order of the officer having jurisdiction over the proceedings, and by process of attachment for disobedience thereof, on the application of any creditor, or of the debtor, and on proof of the neglect of the sheriff.³

3. ATTACHMENTS AGAINST FOREIGN CORPORATIONS.

§ 385. The warrant of attachment against a foreign corporation, under the provisions of the Revised Statutes, may be allowed by the supreme court, the superior court of the city of New York, and by the court of common pleas in and for the city and county of New York, or by any judge thereof in vacation, and by any officer authorized to perform the duties of such judge at chambers.⁴ But it cannot be allowed by any such judge or officer at chambers, during the sitting of the court.⁵

386. The sheriff to whom such attachment shall be directed and delivered, shall proceed thereon in all respects in the manner prescribed by law, in case of attachments against absent debtors, and shall make

¹ 3 R. S. 85, §§ 41, 42.

² 3 R. S. 89, § 68.

³ 3 R. S. 89, § 69.

⁴ 3 R. S. 756, §§ 13, 14.

⁵ 3 Hill 454, Anon.

and return an inventory, and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such suit, and shall, under the direction of the officer issuing such attachment, collect, receive and take into his possession all debts, credits and effects of such debtor, and commence such suits and take such legal proceedings, either in his own name, or in the name of such foreign corporation, as may be necessary for that purpose, and discontinue the same at such time and on such terms as the said officer may direct.¹

§ 387. The suits authorized to be brought by or in the name of the sheriff, may be prosecuted by the attaching creditor, or party beneficially interested in the attachment, by an attorney or solicitor to be employed by him, and at his costs and charges, upon delivering to the said sheriff a bond in the penalty of five hundred dollars, with two sureties, to be conditioned to indemnify and save the said sheriff harmless from all damages, costs and expenses of the said suit. The said sureties shall in all cases wherein it shall be required by the sheriff, justify as good and sufficient sureties, by making an affidavit that each of them is a householder, worth double the amount of the penalty of the said bond, over and above all demands and liabilities, which justification shall be made before any officer authorized to take the justification of bail in the court out of which said attachment was issued, upon at least one day's notice in writing, to such sheriff.²

§ 388. The rights or shares which any foreign corporation may have or own in the stock of any bank, banking association, insurance company or other company or corporation, together with the interest, rents and profits due and growing due thereon, and all trust property, real or personal, funds, deposits, moneys or credits held by or due from any bank, insurance company, or other company or corporation or individual in this state, for and in behalf or to such foreign corporation, shall be liable to be attached in actions at law, and levied upon and sold to satisfy any judgment and execution.³

§ 389. The execution of the attachment upon any such rights or shares, or trust property, funds, deposits, moneys or credits, shall be made by leaving a true and attested copy of the writ, by the officer serving the same, with his proper indorsement thereon, with the cashier of such bank, or with the secretary or clerk of such insurance company or other company or corporation, or with such individual holding such trust property, funds, deposits, moneys or credits and such rights or shares, together with the interest, rents and profits and such trust

¹ 3 R. S. 757, § 19.

² 3 R. S. 760, § 23.

³ 3 R. S. 757, § 20.

funds, deposits, moneys or credits, shall be holden to respond to the judgment which may be recovered in such action, or to satisfy such execution.¹

§ 390. Whenever a sheriff shall, with a writ of attachment or execution against a foreign corporation, apply to such cashier, secretary, or clerk, or to such individual for the purpose of so attaching or levying upon such rights or shares, or such trust property, funds, deposits, moneys or credits, the cashier, secretary, or clerk, or individual, shall furnish him with a certificate under his hand, in his official capacity, if he be an officer, designating the number of rights or shares such foreign corporation holds in the stock of such bank, company or corporation, with the incumbrances thereon, if any there be, and the amount of the dividend due thereon, or the amount and description of such trust property, funds, deposits, moneys or credits, held by such company, corporation, or individual, for the benefit of such foreign corporation.²

§ 391. In case any cashier, secretary, clerk, or individual, upon whom any sheriff shall serve any such attachment or execution, shall refuse to furnish him with the certificate required, then it shall be lawful for the plaintiff in such attachment or execution, to require the examination of such cashier, secretary, clerk, or individual, before any officer of the court out of which said attachment or execution shall have been issued.³ Such officer may issue his warrant commanding any sheriff or constable to cause such officer or individual to be brought before him at such time and place as he shall appoint, for the purpose of being examined, and if he shall refuse to be sworn, or to answer satisfactorily all lawful questions put to him, not having a reasonable objection thereto, to be allowed by such officer, the said officer shall, by warrant commit him to prison, there to remain without bail, until he shall submit to be sworn, or to answer as required; and he shall be detained in jail, in the manner prescribed for the confinement of an insolvent or other person, who refuses to answer touching the concealment or embezzlement of property.⁴

§ 392. If any property so seized shall be perishable, or if any part of it be claimed by any other person than such corporation, or if any part of it consist of a vessel belonging to any port or place in this state, or any of the United States, or of any foreign vessel, or of any share or interest in any vessel, the same proceedings shall be had in all respects as are provided by law upon attachments against absent debtors.⁵

¹ 3 R. S. 757, § 21.

² 3 R. S. 757, § 22.

³ 3 R. S. 760, § 34.

⁴ Ante, § 252; 3 R. S. 761, § 35; 3 R. S. 117, §§ 15-18.

⁵ 3 R. S. 759, § 25; Ante, §§ 75, 76.

§ 393. Any bond required in any such case to be given by a petitioning creditor, may be given by the plaintiff in the suit; and any bond required to be given to the sheriff serving such attachment, shall be held for the benefit of the plaintiff in such suit. And if the plaintiff in such action be nonsuited, or discontinue the same, or judgment for any cause pass against him, every such bond taken by the sheriff, all the proceeds of such sales, and all the property of such corporation remaining in his hands, shall be delivered by such sheriff to the defendants or their agents, in the same manner and upon the same terms, as are prescribed in the case of an attachment against an absent debtor being discharged; and in case of the failure of such corporation to comply with such terms, the sheriff shall proceed in like manner, as directed in case of an absent debtor.¹

§ 394. In case judgment be entered for the plaintiff in any such suit, the lien of such judgment dates from the time the property was attached; and when the execution is issued, it must be directed to, and be executed by the sheriff who served the attachment, notwithstanding he may have since gone out of office.² And such sheriff shall satisfy such judgment out of the property attached by him, if it shall be sufficient for that purpose:

1. By paying over to such plaintiff the proceeds of all sales of perishable property and of any vessel, or share or interest in any vessel sold by him or so much as shall be necessary to satisfy such judgment;

2. If any balance remains due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution so much of the attached property, real or personal, as may be necessary to satisfy such balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares which the defendant may have or own in the stock of any bank, banking association, insurance company, or other company or corporation, interest, rents, and profits thereon, or trust property, real or personal, funds, deposits, moneys or credits, the sheriff shall execute to the purchaser a deed or bill of sale thereof, and the purchaser shall thereupon, on demand, be entitled to all such property, deposits, trust property, funds, moneys, or credits, and all such rights and shares or stock, and shall have all the rights and privileges in respect thereto, as were possessed by such foreign corporation;

3. If any of the attached property or effects belonging to such foreign corporation, shall have passed out of the hands of such sheriff by delivery or otherwise, without having been sold, such sheriff shall

¹ Ante, § 381; 3 R. S. 759, §§ 26, 27.

² 6 Hill 362, *The Am. Ex. Bank v. The Morris Canal & Banking Co.*

repossess himself of the same, and for that purpose he shall have all the authority which he had to seize the same, under the attachment; and any person who shall wilfully conceal, withhold or detain any such property or effects, from the said sheriff, shall be liable to double damages at the suit of the parties interested and injured;

4. Until the judgment against such foreign corporation shall be paid, such sheriff shall proceed to collect the notes, bills, and other evidences of debts that may have been seized under such attachment and to prosecute any bond which he may have taken in the course of such proceedings and apply the proceeds thereof to the payment of such judgment; and when such judgment and all costs of the proceedings have been fully paid, the sheriff, upon reasonable demand, shall deliver over to such foreign corporation all the residue of such attached property or the proceeds thereof.¹

4. WARRANTS ON DEMANDS AGAINST SHIPS. ^a

§ 395. The warrant to collect any lien upon any ship or vessel including steamships and canal boats for any debt due, or for any injury to another vessel, may be granted by an officer authorized by law to perform the duties of a justice of the supreme court at chambers in the county within which such ship or vessel shall be, or in the city of New York by any justice of the superior court of law therein. Such warrant shall be delivered to the sheriff of such county and shall specify the amount of the claim and the names of the persons making such claim and commanding him to attach, seize and safely keep said ship or vessel, her tackle apparel and furniture to satisfy such claim, if established to be a lien upon such vessel, according to law and to make return of his proceeding under such warrant to the officer who issued the same, within ten days after such seizure. Such sheriff shall also in his return state whether he seized such ship or vessel by virtue of any other warrant or warrants and specifying in whose behalf such other warrants have been issued respectively, and the time of his receipt thereof.²

§ 396. The sheriff to whom any such warrant shall be directed and delivered shall further execute the same and shall keep the ship or vessel and other property seized by him to be disposed of as hereinafter directed.³

¹ 3 R. S. 758, § 23.

² 50 Barb. 490, In the matter of the

steamship *Circassian*; 45 Barb. 269

Crawford v. Collins; 4 R. S. 652, § 6.

³ 4 R. S. 653, § 8.

^a Ala.—R. C. § 3002.

Ark.—Dig. 1858, p. 178.

Mich.—St. 1857, p. 1313.

Minn.—Rev. 1866, p. 568.

Miss.—Rev. Code, p. 383.

Mo.—Gen. St. 1868, p. 572.

Neb.—R. S. p. 515.

N. J.—Laws 1857, p. 382.

Penn.—Dig. 1861, p. 63.

§ 397. On receiving a proper bond from the owners of the vessel, the officer issuing the warrant may discharge the same; and no farther proceedings against the vessel so seized shall be had under the provisions of the statute, founded upon any demand included in such bond.¹ The sheriff should not permit the vessel to go out of his possession without such order of discharge, else he may be liable to the attaching creditors.²

§ 398. If the warrant shall not be discharged the officer who issued the same, shall issue his order to the sheriff holding the vessel directing him to proceed and sell the vessel, her tackle apparel and furniture, and such order shall state the amount deemed necessary to be raised to satisfy all unsatisfied liens which have been exhibited against such vessel.³

§ 399. Within ten days after the service of such order, the sheriff shall proceed to sell the vessel so seized by him, her tackle, apparel and furniture, upon the same notice, in the same manner, and in all respects subject to the provisions of law in case of the sale of personal property on execution;⁴ and the sheriff shall return to the officer granting such order his proceedings under the same, and the proceeds of such sale, after deducting his fees and expenses in seizing preserving, watching and selling such vessel, when duly taxed, shall be retained by such sheriff in his hands to be distributed and paid by him on the order of the officer issuing such warrant.⁵ Upon the distribution of such proceeds, the various claims exhibited which are found to be subsisting liens upon such vessel or the proceeds of sale thereof, according to the provisions of the act shall, with their respective costs, expenses and allowances, be ordered to be paid out of such proceeds in the order of delivery of the respective warrants to the sheriff.⁶ The proceeds of any sale shall be subject to the direction of the court, and may at any time be invested by such court according to the practice thereof.⁷

§ 400. Every sheriff to whom a warrant may have been delivered for execution, may be compelled by any officer having jurisdiction over the proceedings thereon, to return such warrant, with his proceedings thereon, and to pay over moneys in his hands, and to take any steps necessary for the safety of the vessel, pursuant to any order for that purpose, by an order of such officer, and by process of attachment for disobedience thereof, on the application of any person interested therein.⁸ In the absence or inability the officer before whom the proceedings were commenced, or by his order to that effect, the

¹ 4 R. S. 653, § 12.

² 11 Wend. 639, West v. Tuttle.

³ 4 R. S. 655, § 15.

⁴ 4 R. S. 654, § 16.

⁵ 4 R. S. 654, § 17.

⁶ 4 R. S. 654, § 19.

⁷ 4 R. S. 656, § 26.

⁸ 4 R. S. 657, § 32.

same proceedings, or any part thereof, may be continued before any other judge of the court.¹

CHAPTER XXII.

OF WRITS OF NE EXEAT.

§ 401. Any justice of the supreme court, or any county judge, may, out of court, allow writs of ne exeat in suits and proceedings in the supreme court, according to the course and practice of such court, in such cases and under such regulations as shall be provided by law, or by the rules and regulations of such court not inconsistent with law.²

§ 402. The writ of ne exeat must be directed to the sheriff of the county, to whom it is delivered for service, and it shall be served by him, by arresting the defendant if he can be found therein. The arrest may be made at the same times, and in the same places, and in the same manner as arrests upon an order of arrest under the Code; and the officer will have the same power to command the assistance of others as in such cases.³

§ 403. Upon arresting the defendant, the sheriff may take from him a bond in the penalty marked upon the writ, (which must not be enlarged by the sheriff, for the penalty of the bond is the amount marked on the writ and not double that sum) conditioned that the defendant will not depart from, or leave the state without the permission of the court. In taking the bond, the sheriff should be cautious that the sureties are competent, for he is answerable for their sufficiency, under all circumstances, and the court has nothing to do with the acts of the sheriff therein.⁴ And if the defendant departs the state pending the suit, so that he cannot be made amenable to the process of the court, or compelled to perform the final decree, the court will, on affidavit, order the sheriff to pay the decree with interest and costs of the motion. But the court will first give to the sheriff time to produce the defendant; or if he is unable to do so, it will give him time to collect the amount of the bond taken by him before it compels him to pay the decree.⁵

§ 404. If the defendant on being arrested, on ne exeat, fail to give

¹ 4 R. S. 657, § 31,

² 3 R. S. 292, § 55; 7 How. 389, *Bushnell v. Bushnell*; S. C. 15 Barb. 399. See 25 How. 181, *Johnson v. Johnson* and 2 Sandf. 626, *Fuller v. Emeric*; which hold the writ abolished by the Code, and 5 How. 125, *Forrest v. Forrest*; S. C. 10 Barb. 46; 7 How. 389, *Bushnell v. Bushnell*; S. C. 15

Barb. 399; 22 How. 590, *Neville v. Neville*, and 54 Barb. 212, *Beech v. Smith*, which hold the contrary.

³ 1 Barb. Ch. 654; Ante, §§ 327, &c.

⁴ 1 Barb. Ch. Pr. 651, 654; 1 Hoff. Ch. Pr. 167; 10 Barb. 46, *Forrest v. Forrest*.

⁵ 2 Paige, 489 *Brayton v. Smith*.

such bail as shall be satisfactory to the sheriff, he must be kept in custody according to the command of the writ, and the sheriff must state that fact in his return thereto. The defendant is not entitled as of course to the limits.¹

§ 405. The sureties of one arrested on ne exeat, may surrender him, or he may surrender himself in exoneration of his bail. To effect such surrender, two copies of such bond, proved by the affidavits of the officer to whom the same was given, or certified by the officer with whom the same shall have been filed, to be true copies, shall be produced before a justice of the supreme court, before whom such suit or proceeding is pending, and an order of commitment shall be made by such officer, before whom said copies are produced, on one of such copies, and be delivered to the officer who originally arrested the party, whose duty it shall be to receive such party and hold him in his custody, in virtue of the original process against him and arrest thereon, and to obey the exigency of such process in the same manner as if such bail bond had not been given; and the other of such copies shall be filed with the order for the discharge of the bail, with the officer who issued the process, in virtue of which such party was arrested; and such order when filed, together with an acknowledgment of the receipt of the person by the proper officer, shall operate as a discharge of the said bail or sureties from all further liability. But if a suit has been commenced against such bail, the said suit shall be discharged on such terms or conditions as shall be deemed just by the court in which such suit was pending, on application to such court for that purpose and not otherwise.²

§ 406. If the arrest of the party was made on a writ of ne exeat, and the surrender was upon a bond given on such arrest, the sheriff, unless restrained by an order of a justice of the supreme court, may by virtue of said writ, and the arrest made thereon, release the said party from his custody, on his executing to the officer a new bail bond with satisfactory sureties, with the like penalty and condition as before; and if the arrest of the party was by any other process, the party shall not again be discharged from the custody of the sheriff on bail except by order or permission of a justice of the supreme court. When new bail shall be given, and the party discharged from custody on such bail, the bond shall be of the same form and effect, and the liability of the officer shall be the same as upon an original arrest.³

¹ 1 Barb. Ch. Pr. 654; 1 Hoff. Ch. Pr. 168.

² 3 R. S. 665, §§ 34, 35.

³ 3 R. S. 666, §§ 36.

CHAPTER XXIII.

OF THE EXECUTION. ^a

§ 407. There are several forms of executions for enforcing a judgment in civil actions which will be mentioned in their order. They need not be under seal; nor tested in the name of the chief justice of the court from which they issue, nor signed with the name of the clerk thereof.¹ But they must be subscribed by the party issuing them, or by his attorney, and be directed to the sheriff of the county to which they are delivered, or to the coroner if the sheriff is a party or interested.² They must intelligibly refer to the judgment stating the court, the county where the judgment roll or transcript is filed; the names of the parties,³ the amount of the judgment, and if it be for money, the amount actually due thereon, and the time of docketing in the clerk's office of the county to which it is issued, and shall require the officer substantially, as follows:

1. If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real estate belonging to him on the day when the judgment was docketed in the county, or any time thereafter;

2. If it be against real or personal property, in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property;

3. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor and commit him to the jail

¹ Code, § 286.

² Code, § 289.

³ 32 Barb. 277, *Farnham v. Hildreth*.

^a Ala.—R. C., §§ 1783, 2837.

Ark.—Dig. 1858, p. 498.

Cal.—Dig. 1860, p. 194.

Conn.—Rev. 1866, pp. 48, 58.

Del.—R. S. 1852, p. 89.

Fa.—Dig. 1847, p. 354.

Ga.—Code, 682.

Ill.—1 St. 603.

Ind.—2 R. S. 1852, p. 128.

Ia.—Rev. 1860, p. 599.

Kan.—Gen. St. 1868, p. 712.

Ky.—1 R. S. 472.

La.—R. S. 527.

Me.—R. S. 457, 538; Laws, 863, p. 130.

Md.—Code, p. 539.

Mass. St. 1860 pp. 516, 685.

Mich.—St. 1857, p. 1206.

Minn. Rev. 1866, p. 467.

Miss.—Rev. Code, pp. 123, 525.

Mo.—Gen. St. 1865, p. 639.

Neb.—R. S. 472.

Nev.—St. 1869, p. 231.

N. H.—Gen. St. 1867, p. 438.

N. J.—Dig. 1855, p. 247; Laws 1865, p. 469.

N. C.—Rev. Code, p. 274; Laws 1867, p. 76; Laws 1869, p. 585.

O.—2 R. S. 1062, Sup't R. S. 565.

On.—Gen. Laws 208.

Penn.—Dig. 1861, p. 429.

R. I.—R. S. 469.

S. C.—Code, p. 489.

Tenn.—Code, p. 571.

Tex.—Laws 1866, p. 199.

Vt.—Gen. St. 1863, p. 361.

Va.—Code, 1849, p. 252.

Wis.—R. S. 782.

of the county, until he shall pay the judgment, or be discharged according to law ;

4. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages or rents and profits, recovered by the same judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property,¹

5. An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.²

§ 408. The execution on a judgment in a court of record may issue at any time within five years after the entry of the judgment.³ After that time, it can only be issued by leave of the court.⁴ But if there has been an execution issued within five years, and returned unsatisfied in whole or in part, a subsequent one may be issued without leave, though more than five years have elapsed.⁵ An execution upon a decree of a surrogate may be issued to the county where the transcript thereof is filed, in the same manner as if it was a judgment in the court of common pleas of said county.⁶ And a justice's judgment, from the time the same is docketed in the office of the county clerk, shall be a judgment of the county court.⁷ If any judgment be entered after the death of a debtor, no execution can issue at all, but the judgment must be paid in the course of administration.⁸ But if the defendant dies after the judgment, and before execution is issued, it may be issued at any time after one year from his death, and not before, upon leave granted by the surrogate.⁹ But if there are any other defendants, and the execution is sought to be collected out of them, it may be issued as if all were living.¹⁰ If the defendant dies after the execution is issued, it is to be executed as if

¹ Code, § 289.

² Code, § 287 ; 25 How. 94, *Moncrief v. Ward* ; 30 Barb. 506, *Marsh v. Potter*.

³ Code, § 283.

⁴ Code, § 284.

⁵ 9 How. 245, *McSmith v. Van Deusen* ; 53 Barb. 537, *Flanagan v. Tinen*.

⁶ 3 R. S. 366, § 18 and Laws 1844, Ch. 104, § 2.

⁷ Code, § 63.

⁸ 3 R. S. 638, § 8.

⁹ 3 R. S. 642, § 30 ; Id. 649, § 41.

¹⁰ 19 Wend. 644, *Day v. Rice* ; 21 Barb. 311, *Bellinger v. Ford* ; S. C. 14, Id. 250.

he were living.¹ An execution cannot issue on a judgment after the death of the judgment creditor. The remedy is said to be by action by the executor under section four hundred and twenty-eight of the Code.² When bail shall have been taken on the arrest, the execution may be issued against the property or the body of the defendant.³ But in such case it cannot issue against the body until an execution against the goods and chattels, lands and tenements of such defendant shall have been returned unsatisfied in whole or in part.⁴ But if the defendant be imprisoned on execution in another cause, or upon process in the same action, or be surrendered in exoneration of his bail in such action, an execution may issue against his body, without any previous execution against the property.⁵ The sending an execution to the sheriff before the judgment record is actually filed, or the judgment docketed, with instructions from the attorney not to levy until the same is filed and docketed, will not be irregular, if no levy is made until such time. The officer receiving the execution, holds it as the special agent of the attorney for the time.⁶ In such case the sheriff should not mark the execution as received by him, until the time the judgment is actually docketed. If the defendant be taken in execution, all other remedies are suspended, and no other execution can be executed against him upon the judgment while he is so charged. But if he die while so charged, or escape or be rescued, or be discharged under any insolvent law discharging his person, new executions may be issued against his body, if he escape or be rescued, or against his property, if he die or be so discharged, in the same manner as if he had never been charged in execution.⁷ If, after a levy, an execution is lost, the court out of which it issued has power to order a substituted execution to issue and the endorsement and levy made thereon, and the latter become the original for all purposes.⁸

§ 409. The execution is made returnable within sixty days after its receipt by the officer to the clerk of the court with whom the record of the judgment is filed.⁹ The plaintiff has no power to issue an execution returnable within any number of days less than sixty.¹⁰ This is for the benefit of the sheriff and to prevent compulsory process against him; but he may return it sooner if he choose.¹¹

§ 410. Upon the receipt of an execution the sheriff, if desired, shall give to the person delivering the same, on the payment of the fee

¹ 47 Barb. 498, *Becker v. Becker*.

² 14 Barb. 250, *Bellinger v. Ford*; S. C. 21, Id. 311.

³ 3 R. S. 643, § 2.

⁴ 3 R. S. 643, § 4.

⁵ 3 R. S. 643, § 5.

⁶ 22 Wend. 566, *Walters v. Sykes*.

⁷ 3 R. S. 649, § 42, *Graham's Pr.* 356.

⁸ 1 Com. 163, *Burckle v. Luce*.

⁹ Code, § 290.

¹⁰ 17 How. 157, *Spencer v. Cuyler*.

¹¹ 35 N. Y. 29, *Renaud v. O'Brien*; 33 Barb. 327, *Tyler v. Willis*.

allowed by law, a minute in writing signed by him, specifying the name of the execution, its general nature and the day of receiving it;¹ and, on like request, he must give to the party served, a copy of such execution without charge.² He must also mark upon it the exact year, and day, and hour, and minute of its receipt by him.³ And this indorsement will be held conclusive evidence against him, that the execution was in his hands at the time.⁴

§ 411. Where the execution is against the property of the defendant, it may be issued to the sheriff of the county where the judgment is docketed, and to several counties at the same time.⁵ And though the execution is not so docketed, it will be good in the sheriff's hands until it be set aside by a court of competent authority.⁶ But where the execution is for the delivery of real property, it must be directed and delivered to the sheriff of the county where such property, or a part thereof is situated.⁷ And if the execution be on a judgment on an attachment against a foreign corporation or absconding debtor, it must be directed and delivered to the sheriff who served the attachment, and who holds the property attached, notwithstanding he has since gone out of office.⁸

§ 412. The plaintiff in the execution has the right to control the sheriff in the service thereof, and so has the attorney of the plaintiff, by virtue of his original retainer; and either may authorize him to depart from the regular and ordinary course of executing it.⁹ The sheriff may, by direction of the plaintiff or his attorney, be restrained and limited as a special agent, as to every act which is within his general authority under the execution. Thus, on an execution against several defendants, it is competent for the plaintiff or his attorney, to direct the sheriff to whom the execution is delivered, to levy upon the property of all or either of the defendants.¹⁰ And the attorney may at any time countermand the execution, and the sheriff is bound to obey his instructions and suspend proceedings upon it whenever he is directed to do so, unless it be a case of collusion between the parties for the obvious purpose of defrauding the sheriff out of his fees, where the plaintiff and attorney are both insolvent or irresponsible.¹¹ But the sheriff is not bound to obey the instructions of the plaintiff in executing the writ, if he sees that it will produce a great sacrifice of prop-

¹ 3 R. S. 738, § 96.

² 3 R. S. 739, § 97.

³ 3 R. S. 643, § 10.

⁴ 1 Hall, 579, *Williams v. Lowndes*.

⁵ Code, § 287.

⁶ 6 Barb. 308, *Roth v. Schloss*.

⁷ Code, § 287.

⁸ 6 Hill 362, *The Am. Ex. Bk. v. The Morris Canal & Banking Co.*; 27 Barb. 463, *McKay v. Harrower*.

⁹ 1 Wend. 365, *Colton v. Camp*; 22 Wend. 566, *Walters v. Sykes*; 6 Cow. 465, *Armstrong v. Garrow*; 7 Cow. 739, *Gorham v. Gale*.

¹⁰ 22 Wend. 569, *Godfrey v. Gibbons*; 30 N. Y. 9, *Root v. Wagner*.

¹¹ 4 Wend. 474, *Jackson ex d. Anderson v. Anderson*.

erty, but he should rather postpone the sale, especially where the plaintiff cannot sustain any injury by the delay. He should take all necessary means to secure the sum he is directed to levy, but as to the time, place, and manner of sale, he is vested with a sound discretion. It was held that the plaintiff had no right to direct that the purchase money should be paid in silver, especially where no notice had been given that it would be required on the sale; and if the officer obey him, it would be an abuse of his duty and censurable. If the party require it, a postponement should be had so that the defendant and bidders might be prepared.¹ Where the plaintiff in an execution, or his attorney instructs a deputy holding the execution, to depart from his duty in executing it, as where he directs him to do nothing after making the levy until further instructions, the deputy ceases to be the servant of the sheriff and becomes the agent of the party, and the sheriff ceases to be liable for his acts or defaults, to such plaintiff. And if the party wishes to change the relation, he must at least give notice to the sheriff himself; fresh instructions to the deputy is not sufficient.² Where the plaintiff directs the deputy to depart in any other way from the regular course of proceedings, as to give a credit on a sale of property or the like, he likewise makes him his agent, and the sheriff will not be liable for the money he may have received on such sale, but the party must look to the deputy.³ But the plaintiff in an execution is not answerable for having made the deputy charged with its service his agent by giving him instructions to sell goods levied upon on credit, if the deputy does nothing in conformity with the instructions. For the purpose of discharging the sheriff from liability for the acts of the deputy, it must be shown, not only that the plaintiff directed the deputy to depart from the line of duty imposed by law, but that the deputy followed, or undertook to follow his directions; and hence where the deputy was authorized to sell goods upon a credit on receiving good endorsed notes, and he allowed purchasers to take the goods bid by them without receiving such notes, it was held that the deputy had not followed the instructions of the plaintiff, and that the sheriff was still liable for his acts.⁴

§ 413. Whenever any execution shall be issued against the property of any person, his goods and chattels situated within the jurisdiction of the officer to whom such execution shall be delivered, shall be bound from the delivery of the same to be executed, whether in or out of office hours,⁵ if a levy is actually made at any time before the return

¹ 2 Cow. 139, *McDonald v. Neilson*.

² 1 Denio, 548, *Mickles v. Hart*.

³ 6 Cow. 467, *Gorham v. Gale*.

⁴ 3 Seld. 453, *Sheldon v. Payne*; 1 Met-

calf 34, *N. Hampshire Savings Bank v. Varnum*.

⁵ 3 R. S. 644, § 13; 26 How. 180, *France v. Hamilton*.

day, either under such execution or any other in the hands of the sheriff, or any of his deputies. When such levy is made, the lien of the execution relates back to the time of the delivery of such execution to the sheriff for service¹ And a levy upon a previous execution will be a valid levy to create a constructive levy on a subsequent one, even where such first execution has become dormant in the hands of the sheriff by reason of instruction from the plaintiff to delay; or the property levied on has been removed out of the state and beyond the reach of the sheriff.² But the title of any purchaser in good faith, of any goods or chattels, acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer to be executed, before such purchase was made.³ And it has been held that something more than a mere presumption of a levy will be required to defeat the title of a bona fide purchaser within a few days after the execution was placed in the sheriff's hands.⁴ But one to whom property is assigned in payment of a preëxisting debt is not such a purchaser in good faith. The lien of the execution, though no levy is made until after the assignment, is superior to the assignee's title.⁵

§ 414. If there are several executions issued out of a court of record, including executions upon a justice's judgment, docketed in the office of the county clerk, against the same defendant, that which shall have been first delivered to an officer to be executed shall have preference, notwithstanding a levy may be first made under another execution.⁶ If there be one or more executions, and one or more attachments against the property of the same defendant, or if there be several attachments, the same rule shall prevail in determining the preference of such execution or attachment.⁷ But if a levy and sale of any goods and chattels shall have been made under such other execution, before an actual levy under the execution first delivered, the sale will be valid and such goods and chattels shall not be levied upon or sold by virtue of such first execution. Where however, the officer sells goods and chattels upon a junior execution, but before paying over the money, he discovers that a prior execution is entitled to the whole or a part

¹ 2 Com. 451, *Peck v. Tiffany*.

² 17 John. 116, *Cresson v. Stout*; 5 Cow. 390, *Russell v. Gibbs*; 2 Com. 451, *Peck v. Tiffany*; 41 Ill. 65, *Leach v. Pine*.

³ 3 R. S. 645, § 17; 4 Hill, 158, *Birdseye v. Ray*; 11 Wend. 548, *Butler v. Maynard*; 11 Paige 21, *Slade v. Van Vechten*.

⁴ 8 Barb. 333, *Millspaugh v. Mitchell*.

⁵ 5 Denio, 619, *Ray v. Birdseye*; 4 Hill 158, *Birdseye v. Ray*; 11 Paige 21, *Slade v. Van Vechten*; 3 Barb. Ch. 630, *Warren v. Paine*.

⁶ 3 R. S. 645, § 14.

⁷ 3 R. S. 645, § 15.

of the money raised, he may at any time before making his return, apply the money accordingly.¹

§ 415. Although an execution issued out of a court of record, becomes a lien upon the goods and chattels of the defendant from the time of the delivery thereof to the officer for execution, yet any execution or attachment issued out of any court not being of record, if actually levied, shall have preference over any other execution issued out of any court, whether of record or not, which shall not have been previously levied.² And when executions are issued from courts of different jurisdictions to different officers, as from state courts to the sheriff and from the United States courts to the marshal, the first execution levied has the prior right. This has been so adjudged by the Supreme Court of the United States in a controversy between those claiming under an execution issued by the state court of Alabama, where the law is as with us that the lien of the execution dates from the delivery to the sheriff, and those claiming under an execution from the District Court of the United States. The court say: "The lien of an execution, under the laws of that state, (Alabama) commences from the delivery of the writ to the sheriff, and the lien in the courts of the United States depends upon the delivery of the writ to their officer. But no provision is made by the statutes of the state or United States for the determination of the priorities between the creditors of the respective courts, state and federal. They merely provide for the settlement of the priorities between the creditors prosecuting their claims in the same jurisdiction. The demands of the respective creditors in this instance, were reduced to judgments, and the officers of either court were invested with authority to seize the property. The liens were consequently coordinate or equal; and, in such cases, the tribunal which first acquires possession of the property, by the seizure of its officers, may dispose of it so as to vest a title in the purchases, discharged of the claims of creditors of the same grade."³

§ 416. But though executions issued out of courts of record are liens upon, and are to be paid out of the proceeds of the sale of the defendant's personal property, in the order in which they were received by the sheriff, yet, under certain circumstances, the lien of the older execution may be lost by becoming dormant in the hands of the sheriff, and a junior execution against which such objection cannot be made,

¹ 2 Com. 451, *Peck v. Tiffany*; 1 B. Monroe (Ky.) 311, *Millien v. Commonwealth*; 6 B. Monroe (Ky.) 415, *Kenyon v. Ficklin*.

² 3 R. S. 645, § 16; 4 Cow. 461, *Marsh v. Lawrence*; 19 Wend. 495, *Ray v.*

Harcourt; 20 Wend. 41, *Dubois v. Harcourt*.

³ 17 How. (U. S.) 471, *Pulliam v. Osborn*; 10 Peters (U. S.) 400, *Hagan v. Lucas*.

may become entitled to the preference. What will render an execution dormant must be determined by the circumstances in each particular case. Mere delay or neglect of duty on the part of the sheriff, without the express direction of the party issuing the execution, will never render it dormant. It can only be so in cases where the plaintiff or party in interest has interfered with its execution.¹ If after a levy, the sheriff receives express direction to delay the sale until a junior execution is received, this will render the transaction fraudulent.² And so where the plaintiff directed a levy, and that it be kept secret from the defendant, it was construed to be a direction for delay, and the execution was declared dormant.³ And where the plaintiff, after levy, directs a stay until farther directions, and the defendant in the meantime, with whom the property is left, sells it to a bona fide purchaser, it has been held that the execution had become dormant, and the lien of the levy gone.⁴ So if the defendant is permitted to use and consume the goods levied on, this is evidence of fraud, and the goods may be liable to a subsequent execution.⁵ And though the property in any such case is in the hands of a former sheriff, the present sheriff, on receiving a junior execution against the owner of the property, will be bound to levy; for where the sheriff finds the former sheriff in the possession of property against which he holds an execution, it is his duty to inquire under what circumstances he holds it.⁶

§ 417. But merely leaving the property levied upon in the possession of the defendant, though with the consent of the plaintiff, is not of itself fraudulent, either as against subsequent creditors or purchasers, unless the sheriff is also directed by the party to delay the sale, or the defendant is allowed to consume the property.⁷ And this, though there be delay of a year.⁸ To render an execution dormant, there must be an interference with the execution by the plaintiff. But it has been held that it was not such interference, where the plaintiff said that he did not want the defendant distressed; or that he was

¹ 5 Cow. 390, *Russell v. Gibbs*; 12 Wend. 404, *Benjamin v. Smith*; 5 Hill, 377, *Knower v. Barnard*; 12 S. & M. (Miss.) 117, *Cockerel v. Wynn*.

² 11 John. 110, *Storm v. Woods*; 17 John. 274, *Kellogg v. Griffin*; 3 Cow. 272, *Rew v. Barber*; 5 Cow. 390, *Russell v. Gibbs*; 7 Cow. 560, *Power v. Van Buren*; 2 Hill 364, *Kimball v. Munger*; 5 Hill 377, *Knower v. Barnard*.

³ 16 Barb. 585, *Price v. Shipp*.

⁴ 2 Wend. 419, *Hicok v. Coates*; 9 Mo. 130, *Wise v. Darby*.

⁵ 2 Wend. 419, *Hicok v. Coates*; 2 John. 418, *Whipple v. Foot*; 15 John. 428, *Farrington v. Sinclair*; 17 John. 332, *Dickinson v. Cook*.

⁶ *Graham's Pr.* 383; 5 Cow. 390, *Russell v. Gibbs*.

⁷ 3 Cow. 272, *Rew v. Barber*; 11 John. 110, *Storm v. Woods*; 6 Hill 232, *Herkimer Co. Bank v. Brown*; 12 Wend. 404, *Benjamin v. Smith*; 15 John. 428, *Farrington v. Sinclair*; 11 Wend. 548, *Butler v. Maynard*.

⁸ 6 Hill 232, *Herkimer Co. Bank v. Brown*.

honest and would not secrete his goods, and that the sheriff might levy on them, and safely leave them in the defendant's custody; nor where he said to the sheriff, you must have my money at the return of the writ, but I do not object to any indulgence you can give to the defendant in the meantime; nor by saying, levy and get my money, but you need not move the horse and wagon and sell until the man has hauled in his crop, which is nearly ready; nor by saying levy on all, but do not sell till his wife is recovered from her illness.¹ Where, after a levy and removal of the property, a third person purchased the execution and directed the officer to return the property and leave it with the defendant, no reason appearing to have been assigned for this direction, and the debtor afterwards sold the property as his own, and in the following month the officer took possession of it and sold it under the execution, it was held that as there were no instructions to delay, and no express permission to the defendant to use the property, the execution was not fraudulent as against the purchaser.² And where an execution was issued in November, with instructions to levy upon the defendant's property which consisted principally of hides in vats which could not be sold without sacrifice before spring, and the officer was, for this reason, at the same time instructed not to sell until May; but other executions being issued, he was directed to hasten the sale under the first, the court held that there was no fraud, but that the delay under the circumstances was proper.³ But, if from the directions of the plaintiff, it is apparent that the levy is made, not to collect the money, but to protect the defendant's goods from other creditors, it will be otherwise.⁴

§ 418. Where there is a question of this character between different executions, the order of priority is usually determined by the court upon motion, between the execution creditors. And where in such case, the court direct how the money realized shall be applied, the sheriff is bound to apply the same accordingly. And the county court has the power to determine the priority between an execution issued out of such court, and another out of the supreme court. Where there is a claim that the first execution has become dormant, and that a junior execution is thereby entitled to precedence, the sheriff ought, before paying over the money to either party, to take a proper indemnity against doing so. Or, what is perhaps better, pay the money into court, and leave the parties to settle the question of right between themselves.

§ 419. On the receipt of an execution, if the defendant will not

¹ Graham's Pr. 384.

² 3 Cow, 272, *Rew v. Barber*.

³ 7 Cow. 560, *Power v. Van Buren*.

⁴ 1 Graham's Pr. 384.

pay the amount directed to be collected thereon, it is the sheriff's duty to proceed to execute the same according to the command thereof;' and for this purpose, to make a levy upon the goods and chattels of the defendant sufficient to pay the amount directed to be collected upon the execution, with interest and his fees, if so much can be found in his county. The levy may be made on the return day or at any time before, but not after; and if the officer does levy after the return day he will be a trespasser, and if he so levies by direction of the plaintiff both will be so liable.² But the officer should not wait until the return day before he levies, for the defendant may remove his goods from the county, or sell them to a bona fide purchaser without notice of the execution, or they may be seized upon an execution or attachment issuing out of a court not of record; in all of which cases the sheriff may become responsible to the plaintiff for the amount of the execution. Besides, it is the sheriff's duty to make return of the execution and pay over the amount due thereon by the return day, and he may be attached, or an action will lie against him for not doing so.³ He should therefore levy at the earliest day, and if the defendant will not pay, advertise and sell his goods within such time, that if they do not bring enough to satisfy the execution there will be time to sell his real estate before the return day.

§ 420. The sheriff has no power to settle or discharge an execution, without actual payment of the amount directed thereon to be collected, with interest, unless he proceed to execute it in the due course of law. And if he returns an execution "satisfied" upon receiving the defendant's note, instead of the money, it will be no satisfaction of the judgment or execution;⁴ not even in case the defendant paid the note to another to whom it was transferred.⁵ Though it will be otherwise if it is taken by the direction of the plaintiff, or the transaction is subsequently ratified by him. And so the sheriff may take security for the debt in the regular course of execution, as where he levies, and takes a receipt for the goods with an agreement that they be produced on demand, or to pay the debt. If the receipt be for the whole debt, costs, interest and fees, and the goods are not forthcoming, if they are lost to the defendant by the officer, the plaintiff or the receptor, it will be a satisfaction of the debt, though the goods levied on were insufficient to pay the amount.

¹ 3 R. S. 739, § 98.

² 2 Caines 243, Devoe v. Elliot; 4 John. 450, Vail v. Lewis; 16 John. 287, Haggerty v. Wilber.

³ 3 R. S. 739, § 98.

⁴ 1 Cow. 46, Bank of Orange Co. v. Waterman; 4 Cow. 553, Mumford v. Armstrong; 15 John. 443, Sherman v. Boyce.

⁵ 15 John. 443, Sherman v. Boyce.

And in such case, the sheriff cannot afterwards levy on the property of the defendant to satisfy the execution, though the first was insufficient, or the officer had been unable to receive anything on his receipt.¹ This however, only applies in a case where the property levied on belonged to the defendant in the execution, and was subject to such levy, and that it has been lost to the defendant through the negligence of the officer, the receptor or the plaintiff; and not to a case where the property has been retaken by the defendant; or did not belong to him, but to another, who repossessed himself of it. For it is now the well settled rule that where the defendant has neither paid the debt, nor lost his property by reason of the levy, such levy is no satisfaction of the execution.² And where money is tendered to the sheriff upon any execution in his hands, it is his duty to receive it and forbear to levy and sell,³ and if he does levy or sell after a valid tender of the full amount of debts and costs, he is a trespasser.

§ 421. Any one indebted to the defendant in the execution, may pay any execution against the property of his creditor, in the hands of the sheriff; or apply the amount of his indebtedness thereon, and the sheriff's receipt therefor will be a sufficient discharge for the amount paid.⁴ But such payment cannot be made after there is a notice of an assignment of the indebtedness.⁵

§ 422. The policy which forbids the sheriff from executing final process in which he is a party, equally restrains him from executing any execution in which he may in any way have acquired an interest.⁶ If, while it is in his hands for execution he acquires any interest therein, he cannot proceed in the execution thereof. He cannot, with his own money, pay the plaintiff and keep the defendant's property, nor hold the execution and afterwards make the money advanced out of it.⁷ Nor can the sheriff who advances the money on an execution in his hands, take a bond or note, or other security for the sum so advanced, and retain the execution in his hands to enforce payment of such bond or security, or the moneys advanced.⁸ And even where the sheriff is attached for not returning the execution, and the deputy who held it, pays it and takes an assignment thereof, he cannot enforce

¹ 12 John. 207, Hoyt v. Hudson.³

² 1 Denio 574, The People v. Hopson;
1 Sandf. Ch. 195. Hayden v. Agent
Auburn State Prison; 23 Wend.
490, Green v. Burke.

³ 5 Cow. 248, Jackson ex d. Lansing v.
Law.

⁴ Code, § 293.

⁵ 3 How. 386, Countryman v. Boyer.

⁶ 1 Kernan 61, Carpenter v. Stilwell; 2
Cold. (Tenn.) 2 Stewart v. Magness;
1 Bailey (S. C.) 467, Singletary v.
Carter; 3 Marsh. (Ky.) 538, Cham-
bers v. Thomas.

⁷ 7 John. 426, Reed v. Pruyn; 15 John.
443, Sherman v. Boyce; 9 S. & M.
(Miss.) 521, Morris v. Lake.

⁸ 23 Wend. 314, Mills v. Young.

the collection thereof by a subsequent execution, though the defendant assented to the assignment, and promised to pay.¹ And it makes no difference that the payment of the execution was made upon the order of the court, by way of a fine for neglect of duty under the execution; nor that the money was paid by another, and the assignment taken by such other party, if it was in truth paid with the sheriff's money and for his benefit. He can do no act under such execution to enforce the collection thereof, and a sale of lands thereunder by him, will be void, and confer no rights on the purchaser.² If the sheriff is compelled to pay an execution in his hands, which has not been collected out of the defendant, he should at the time, make proper application to the court, upon notice to the defendant, to be subrogated in the place of the plaintiff in the execution.³ Relief will in most cases be granted by the court, though not so as to affect the rights of others. Thus where the deputy left the property levied upon with the defendant who eloiigned it, and the officer was compelled to pay the value thereof, and took an assignment of the judgment, he was subrogated by the court in the place of the plaintiff, as against the defendant, but not so as to affect purchasers of his real estate, under subsequent judgments.⁴

§ 423. Where there are several defendants in the execution, and some are principals and some sureties, the sheriff ought to collect the execution out of the separate property of such principals, if the same can be done without embarrassing or delaying him in making the amount thereof by the return day. But if the sheriff has no means of determining who is primarily liable, or the question is at all doubtful, he is not bound, at his peril, to decide upon the conflicting claims of the defendants, to equity as between themselves. But the defendant who claims to be surety, and wishes to have the execution enforced against his codefendants should apply to the equitable powers of the court for direction to the sheriff to resort to the property of such codefendants.⁵

§ 424. It is the duty of the sheriff not only to collect the moneys due upon an execution by the return day thereof, but to bring the same into court, or pay the same over to the plaintiff or his attorney, by such return day. It is proper that he do so as soon as he conveniently can, after the same is collected, but he is not bound to do so before the return day, though he may have collected it before.⁶

¹ 5 Hill, 566, *Bigelow v. Prevost*.

² 1 Kernan 61, *Carpenter v. Stilwell*.

³ 12 Barb. 128, *Carpenter v. Stiwell*.

⁴ 19 Wend. 79, *The People v. Onondaga Com. Pl.*

⁵ 2 Barb. Ch. 463, *Boughton v. The Bank of Orleans*.

⁶ 4 Wend. 675 *Crane v. Dygert*.

The usual course is to pay over the moneys collected to the plaintiff, or the party owning the judgment or to the attorney who issued the execution, but it may be paid into court; that is, to the clerk of the court where the judgment, record is filed, and where the execution is to be returned. And if there is any question as to whom the money realized upon the execution belongs; or if there is any controversy between different execution creditors, as to the priority of their executions, or the like, the proper course will be to pay the money into court, in the actions under which claims thereto are made, and leave the parties in interest to apply to the court for a determination of such conflicting claims. But the money must be paid over to the party, or his attorney, or into court, on or before the return day, and without demand, and if the sheriff fails to do so, he will be liable to be proceeded against by attachment and fine, and to an action at the suit of the party aggrieved, at the same time. And it will not be an answer to such attachment or action, that the sheriff had, before any proceedings were taken thereon, returned the execution to the proper office, with a return thereon that he had the moneys in his hands, subject to the plaintiff's order. Nor will the payment of the money into court, after the suit is brought, without acceptance by the plaintiff, be an answer to such action. But where the sheriff under an indemnity, has sold the property of the defendant, and received the money to satisfy the execution, he is not liable to an attachment for not paying it over where it appears that he has been sued by a prior judgment creditor claiming a portion of the fund. The court will not settle the rights of the parties in such case upon a motion for an attachment.¹ And if after levy and sale, a third person sues for the property and recovers a sum exceeding the amount made on the execution, the sheriff will not be liable to the plaintiff in the execution for the moneys collected. And it will not vary his liability that he has been indemnified by such plaintiff.²

§ 425. The sheriff is required to collect the amount directed to be made on the execution delivered to him, with interest up to the time that the money is received by him; and he must pay over the amount received to the party entitled thereto, on or before the return day of the execution. The officer has till the return day of the execution to ascertain whether there are any other executions against the same party and the order of their receipt and who is entitled to the money; and though the money should remain in his hands between the time of collection and the return day, he will not be required to pay interest on it. But if he should retain the money without any valid excuse,

¹ 9 How. 459, *Wilson v. Wright*.

² 21 Wend. 264, *Newland v. Baker*.

after the return day, he will be liable to pay interest from the return day until the money is actually paid to the party entitled to it.¹ The payment is to be made by the sheriff to the person in whose favor the execution issues, or to his attorney; but he is not bound to go out of his county to pay him, not even to run about to find him. If he has received instructions how to pay it, as by forwarding it by mail or the like, they should be strictly pursued, else if the money is lost, or there is delay in its receipt, the sheriff will not be excused. If the sheriff has received no instructions as to payment, and the party does not call for it, the sheriff should return the execution *cu* or before the return day with an endorsement of the amount of money made and it will be the duty of the party to come and receive it.² It has been held that it was no excuse for not paying over money collected by the sheriff that the bank in which he had placed it had failed; nor that it had been stolen from him.³ If the moneys are stayed in the hands of the sheriff by appeal, injunction or order, or there is no proper person to receive it, he will not be liable to the payment of interest during the time he may retain such money. Nor will the defendant be liable to pay interest in such case. All the plaintiff can claim will be the amount due upon his execution, with interest up to the day the amount was paid to the sheriff.⁴

§ 426. If an appeal is brought from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant with at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal.⁵ Such undertaking shall be of no effect, unless it be accompanied by an affidavit of the sureties that they are each worth double the amount specified therein.⁶ And the same must be duly proved or acknowledged in like manner as deeds of real estate,⁷ and filed with the clerk with whom the judgment or order appealed from was entered,⁸ or there may be a deposit

¹ 4 Wend. 675, *Crane v. Dygert*; 13 John. 255, *Slingerland v. Swart*.

² 28 Tex. 479, *De La Garza v. Booth*; 7 J. J. Marsh. (Ky.) 162, *Commonwealth v. Barnetts*, ex'r.; 1 Dana (Ky.) 417, *Canterbury v. Commonwealth*.

³ 27 Ga. R. 238, *Phillips, ex'r. v. Lamar*; 30 Ga. R. 628, *Gilmore v. Moore*.

⁴ 18 John. 133, *Brewster v. Van Ness*;

1 Wend. 534, *Dygert ads. Crane*; 4 Wend. 675, *Crane v. Dygert*; 7 Hill 198, *Shepard v. Hoyt*; 7 How. 44, *Gray v. Griswold*; 4 Seld. 62 *Acker v. Ledyard*.

⁵ Code, § 335.

⁶ Code, § 341.

⁷ Rule 6 Sup. Ct.

⁸ Code, § 343.

in lieu of an undertaking. If an execution has issued in such case, the sheriff is not to regard the appeal until he has been served with a certificate of the clerk of the court of the due filing of such security, but he should proceed with the execution of the writ. And if he has made a levy before such service, he is to retain the same ; and if he has commenced a levy he should complete the same ; and so if he has arrested the defendant, he is to keep him in custody until the determination of the appeal. If the sureties are excepted to, and they or others do not justify according to the rules and practice of the court, the appeal will be regarded as if no undertaking had been given.¹

§ 427. The execution is made returnable within sixty days after its receipt by the sheriff, whether it be against the body of the defendant, or his property.² In the computation of this time, the day of the receipt of the execution by the sheriff is to be excluded, and he has the whole of the sixtieth day in which to execute or return it.³ But he may of course return it within that time, if he has made the money, though he is not bound to do so until the return day. And so he may return the execution within the sixty days if he can find no property of the defendant whereon to levy.⁴ But at the end of the sixty days, whether he has made the money or not, he must return the execution,⁵ (and make due return of his proceedings thereon, which return shall be signed by him,)⁶ to the clerk with whom the record of the judgment is filed.⁷ The duty of the sheriff in paying over moneys collected by him upon an execution has been already pointed out,⁸ while his liability in case of neglect to make return of the process has been referred to.⁹ The defendant as well as the plaintiff may require the sheriff to return an execution on which money has been collected or paid.¹⁰ But neither the plaintiff nor defendant can do so if the parties have compromised before the return day and before sale.¹¹ Nor can a plaintiff compel the sheriff to return a writ in the hands of a special deputy appointed by him, at the request of the plaintiff.¹²

§ 428. If the defendant has no goods or chattels, lands or tenements within the county subject to the execution, the sheriff must return that fact ; or in such case, the words, "nulla bona," endorsed upon

¹ Code, § 341.

² Code, § 290 ; 5 How. 396, *Livingston v. Cleveland* ; 6 Barb. 256, *Fox v. Ames*.

³ 6 Cow. 659, *Homan v. Liswell*.

⁴ 20 Wend. 622, *Evans v. Parker* ; 3 Sandf. 676, *Ross v. Clusman* ; 5 How. 396, *Livingston v. Cleveland*.

⁵ Code, § 290.

⁶ 3 R. S. 739, § 98.

⁷ Code, § 290.

⁸ Ante, § 424.

⁹ Ante, § 40.

¹⁰ Allen 202 ; Rule 6 Sup. Ct.

¹¹ Sewell 409.

¹² 4 Term. 119, *Demoranda v. Dunkin*.

the execution, and signed by the officer, will be a sufficient return. And so if the sheriff finds that any property he may have levied on, under the execution, is subject to a previous lien, sufficient to exhaust it, he may return that the defendant has no goods or chattels, lands or tenements, or, as in other cases, simply *nulla bona*.¹ So too where he seizes goods, and they are claimed by another, if a jury summoned by the sheriff to try the validity of such claim, find the title in such claimant and the plaintiff refuses or neglects to sufficiently indemnify the sheriff against such claim, *nulla bona* will be the proper return. If the sheriff acts in good faith in such case, such inquest will be conclusive in his favor in an action against him by the plaintiff on the ground that such return is false.² But if the plaintiff offers to sufficiently indemnify the sheriff in any case of claim by another, he cannot excuse himself by taking an inquest. So *nulla bona* will be the proper return where, after levy and sale, the officer has been sued and a judgment recovered against him for an amount equal to the money realized on the sale.³ If the sheriff has made a levy, and is unable to raise the money thereon by reason of the want of buyers, he may return that fact upon the execution, and retain the property in his hands until he is served with the writ of *venditioni exponas*, when he must sell the property at whatever price it will bring. When the sheriff collects a part only, of the moneys due on the execution, he must state in his return the amount made, and return the execution *nulla bona* for the residue. If he collects the whole, he returns that he has made the amount of the execution, but usually he simply endorses "satisfied," on the execution, and signs it as in other cases. This return will be conclusive upon him that he has received the amount of the execution,⁴ but it will be no evidence whatever that the money was paid to the party entitled thereto. It is usual and proper therefore to take the receipt of plaintiff or his attorney upon the execution; or what will be safer, take a separate receipt for the amount of moneys paid.⁵ When the sheriff makes a levy and sells personal property concerning which there is likely to be any litigation, he ought to return his levy upon the execution, and what property was sold, and what, if any was returned to the defendant, and such indorsement of levy will be *prima facie* evidence in his favor in any action that may be brought against him for such levy or sale. Where the sheriff has been prevented from taking the defend-

¹ Allen 205.

² Allen 205; 8 John. 143, *Bayley v. Bates*; 10 John. 98, *Townsend v. Phillips*; 15 John. 147, *Van Cleef v. Felt*; 8 Cow. 65, *Curtis v. Patterson*;

7 Wend. 236, *Platt v. Sherry*; 1 Hall, 579, *Williams v. Lowndes*.

³ 21 Wend. 264, *Newland v. Baker*.

⁴ 3 Seld. 453, *Sheldon v. Payne*.

⁵ 5 Denio 586, *Browning v. Hanford*.

ant's goods by reason of the bringing an appeal, he should return the special fact, and not *nulla bona*.¹ But if the proper security has not been given, there is no stay of proceedings, and the fact that such appeal was brought will not of itself be a good return.² When real estate is sold on execution, it is not necessary to specify in the return how the moneys were made; whether on the sale of the particular lands or not; nor is it necessary that there should be a return. Such return is not necessary, and forms no part of the purchaser's title, and the fact, if necessary, may be proved by *parol*.³ When the sheriff has returned an execution he cannot be ordered to return a farther specification of the property sold, to enable the defendant to sue him.⁴

§ 429. The right of the sheriff to make return of an execution *nulla bona*, before the return day, where he can find no property whereon to levy; or where the defendant's property is covered by previous liens sufficient to exhaust it; or where it is claimed by another, is undoubted.⁵ And in determining whether it be a proper case to make such a return, he has a reasonable discretion, and such return will not be set aside as false, on affidavits, on the application of the defendant, except where fraud or collusion is shown; and where there are previous liens it will not be set aside where the evidence produced on a motion for that purpose is contradictory in reference to the value of the property over and above such previous liens.⁶ Though it is said that the sheriff has a discretion in making such return, this must be understood as having reference to the question whether the court will set aside such return, where he may have erred in judgment in making it, and not as affecting the rights of the plaintiff or the defendant, to an action against him for the damages they might sustain, if such return be false. A return of this character should therefore be made with great caution; and unless the case is quite clear, the better course will be for him to retain the execution until the return day, and do the best he can to make the money thereon. But if it be a case where the defendant is seeking to evade the payment of a debt by screening his property from execution, or otherwise, there can be no objection to making a speedy return to the execution, at the request of the plaintiff, after the sheriff has made all proper efforts to collect the money from the defendant; and after having called upon the defendant with the execution. In

¹ Allen 205.

² 9 Wend. 224, *The People v. Allen*; Code, § 335.

³ *Caines* 61, *Simonds v. Catlin*; 1 John. Ca. 153, *Jackson ex d.*

Kane v. Sternbergh; 4 Wheat. 508. *Wheaton v. Sexton's Lessees*.

⁴ 1 Sandf. 683, *Shindler v. Blunt*.

⁵ 20 Wend. 622, *Evans v. Parker*.

such case the defendant will have no cause of complaint, for he will have had an opportunity to pay the execution, and the plaintiff of course will be estopped from questioning a return which is made at his instance. But in all such cases, the sheriff should avoid giving one creditor any advantage over another, by making such return; and if he have more than one execution similarly situated, he should return them altogether, that the persons interested therein may be enabled to take such course in reference thereto as they may be advised.

§ 430. Upon the payment to the sheriff of the amount due upon an execution issued upon a judgment obtained in any other county, such sheriff shall, on demand, deliver to the person paying the same, a copy of such execution and of his endorsement of satisfaction thereon, and shall certify the same to be a copy and shall be entitled to receive twenty-five cents therefor; and upon filing the same in the first mentioned county, the clerk shall enter satisfaction of the judgment.¹

CHAPTER XXIV.

OF THE LEVY.^a

§ 431. A levy upon personal property is the act of taking possession of, attaching or seizing it, by the sheriff or other officer under and by virtue of any execution he may hold against the owner of such property, whereby the lien of such execution thereon becomes perfect, and the property is thereupon deemed to be in the custody of the law.

§ 432. The duties and responsibilities of the sheriff, in reference to levies upon personal property under an execution, are amongst the most important and delicate that he is called upon to discharge in civil matters. When he receives an execution against property, he is bound to make reasonable inquiry to ascertain if the defendant has

¹ 4 R. S. 576, § 1.

^a Ala.—R. C. 1867, § 2851.

Cal.—Dig. 1860, p. 195.

Conn.—Rev. 1866, p. 50.

Ill.—1 St. 604.

Ia.—Rev. 1860, p. 601; 9 Ia. 213, Ayres v. Campbell.

Ind.—2 R. S. 1852, p. 134.

Me.—R. S. 457, 532.

Mass.—St. 1860, p. 687.

Mich.—St. 1857, p. 1210.

Minn.—Rev. 1866, p. 487.

Miss.—Rev. Code, 527.

Mo.—Gen. St. 1865, p. 639.

Neb.—R. S. 472.

N. H.—Gen. St. p. 441.

N. J.—Dig. 1855, p. 247; Laws. 1868, p. 409.

N. C.—Rev. Code, 274.

Penn.—Dig. 1861, p. 429.

R. I.—R. S. 473.

Tenn.—Code, p. 875.

Vt.—Gen. St. 1863, p. 362.

Va.—Code, 1869, p. 252.

Wis.—R. S. 785.

any property in his county subject to levy. And if he finds him in the possession of any, whether it is claimed by the defendant that it has been sold, assigned, mortgaged, or is under a previous levy, it is the sheriff's duty to make a levy; and if he neglect to do so, and is sued therefor, it throws upon him the burthen of showing that such property was not in truth liable to the execution.¹ While on the other hand, if he does make a levy, and the property does not belong to the defendant; or if it has been duly sold, assigned, mortgaged or is exempt from levy² or is levied upon by other process, he is liable to the owner or officer holding the first execution for any unwarranted interference with it. And where property is subject to levy, the levy thereon must be so made that the same will be good as against the defendant, bona fide purchasers without notice, and subsequent execution creditors. For if a levy, through the negligence or mistake of the officer, is so made, as to be invalid as to any party, whereby the rights of the plaintiff under the execution be lost or prejudiced, the sheriff is liable to him, to the extent of the damages sustained. The officer should levy upon sufficient property to satisfy the execution, if the defendant have so much; and if he fails to do, whereby the full amount of the execution is not collected, he will be liable to the plaintiff for the damages sustained. But if the officer shall have made diligent effort to find property of the defendant whereon to levy, it will be a good defence even though the defendant should have property.³ If the sheriff wilfully makes an excessive levy, it will be an abuse of his powers, and he will be liable therefor to the party aggrieved.⁴ The sheriff should make a sufficient levy in the first instance to satisfy the execution; but if he fails to do so, he should make an additional levy at a reasonable time thereafter, and before the return day of the execution.⁵ And in determining the amount necessary, he should take into account the probable sacrifice to which it would be subject at public sale.⁶

§ 433. No execution shall be lawfully levied upon any property of the corporation of the city of New York until after ten days notice, in writing, of the issuing of said execution shall have been given to the comptroller of the city of New York by either the party adverse in interest, his agent, attorney or sheriff.⁷

¹ 5 Denio 198, *Camp. v. Chamberlain*; 1 Hall 579, *Williams v. Lowndes*.

² 19 Mo. 369, *The State v. Moore*; 21 Mo. 160, *The State v. Farmer*; 7 Blackf. (Ind.) 275 *Stephens v. Lawson*.

³ Cow. Tr. § 1605, 4th Ed.; 8 Mo. 386, *Fisher v. Gordon*.

⁴ 7 Wend. 236, *Platt v. Sherry*; 3 Hill 215, *Dezell v. Odell*.

⁵ 15 Ind. 23, *Ind. &c. Railway Co. v. Bradley*.

⁶ 30 Ill. 339, *French v. Snyder*.

⁷ 4 R. S. 764, § 5.

§ 434. Before making a levy, the officer should see that the execution is regular on its face, and that the party against whom it is issued is rightly named in it, otherwise he may be a trespasser, even though he execute it against the proper party. Thus it has been held that an execution against Freeman Hildreth would not authorize a sale of the property of Truman Hildreth, though the latter might have been the individual intended.¹

§ 435. As against the defendant in the execution, no great strictness or form will be necessary in making a levy upon personal property. Thus, the mere entering by the sheriff of the property of the defendant, with his assent, upon the execution will be conclusive upon such defendant, though the property is not present, and the officer does not know where it is. But such levy will be invalid as against bona fide purchasers, without notice of such execution and levy, and also as against subsequent execution creditors.²

§ 436 What will constitute a valid levy, as against a bona fide purchaser, or a subsequent execution debtor, is more difficult to determine, and must depend upon the facts and circumstances in each particular case. It may be said however, generally, that there can be no valid levy upon personal property, under an execution as against any other party than the judgment debtor, unless such property is present and subject to the disposition and control of the officer seeking to make the levy;³ and unless he takes possession of it, or exercises such dominion over it as will render him a trespasser, if the process under which he acts is not a protection to him.⁴ But to constitute a valid levy, or to make the officer a trespasser in such case, it is not necessary that he should take actual possession of, or touch or manually interfere with the property. It is sufficient in either case, if the property is present, that he claims to exercise control over it by virtue

¹ 32 Barb. 277, *Farnham v. Hildreth*.

² 11 Wend. 548, *Butler v. Maynard*; 19 Wend. 495, *Ray v. Harcourt*; 9 Barb. 619, *Dresser v. Ainsworth*; 29 How. 47, *Bond v. Willett*.

³ 16 John 288, *Haggerty v. Wilber*; 3 Wend. 446, *Beekman v. Lansing*; 11 Wend. 548, *Butler v. Maynard*; 19 Wend. 495, *Ray v. Harcourt*; 2 Hill 666, *Van Wyck v. Pine*; 1 Keyes 377, *Bond v. Willett*; 58 Penn. 70, *Carey v. Bright*; 46 Penn. 294, *Linton v. Commonwealth ex rel. Ford*; 2 S. & R. 142, *Lewis v. Smith*; 9 Barr. 349, *Lowry v. Coulter*; 1 Harris 160, *Dorrance v. Commonwealth*; 30 Ill. 446, *Hawley v. Lowrey*; 31 Ill. 120, *Davidson v. Wal-*

dron; 40 Ill. 292, *Pierce v. Roche*; 42 Ill. 100, *Chittenden v. Rogers*; 2 Hay. (N. C.) 65, *Blount v. Mitchell*; 49 Me. 381, *Ames v. Taylor*; 29 Ga. 710, *Sheff. v. Shockley*; 4 Wis. 513, *Brown v. Pratt*; 25 Cal. 563, *Herron v. Hughes*; 8 B. Monroe 303, *McBurnie v. Overstreet*.

⁴ 3 Wend. 446, *Beekman v. Lansing*; 14 Wend. 123, *Westervelt v. Pinckney*; 5 Denio 198, *Camp. v. Chamberlain*; 9 Barb. 619, *Dresser v. Ainsworth*; 16 Barb. 585, *Price v. Shipps*; 29 N. Y. 471, *Roth v. Wells*; 34 Barb. 553, *Artizan Bank v. Treadwell*; 18 Ia. Ann. R. 56 *Miller v. Streedier*.

of his writ,¹ or that he makes an inventory of it, or threatens to remove it, unless a receiptor is given.² It is not necessary that the defendant or owner of the goods should assent to the levy, to render it valid;³ nor that the officer should leave any person in possession of the property; nor that he should remove the same.⁴ He may leave it with the defendant, at his own risk; or if with the assent or by the direction of the plaintiff or his attorney, at the risk of the plaintiff;⁵ or he may leave it with any other person who will give him a receipt therefor, and who will thereby be responsible to him for its forthcoming. Nor is it essential that an inventory should be made,⁶ though it is highly important for the security of the officer that this should be done. A full inventory, made at the time, lessens the presumption of fraud, where the property is left with the defendant, and it may be used by the officer to identify the property when wrongfully taken from him by another.⁷ And although in making a levy, the acts of the sheriff should be open and unequivocal, and he should assert his title to the goods, and nothing should be done to cast concealment over the transaction, yet it is not essential that he should proclaim a levy in all cases. Thus, no person may be present when the levy is made, and he is not bound to go about and proclaim what has been done. So it may be deemed advisable that he should keep the knowledge of a levy from the defendant, and other persons, until he can have time to take complete possession of the property; or that he may be able to reach other property of the defendant before he has time to secrete or dispose of it, or before another creditor can levy upon it under other process. And hence, where a levy is actually made and established, the omission to make public avowal of it will not affect its validity.⁸ Where the property is present, any act showing an intention to make a levy is sufficient. Thus where a constable having an execution, went to a field with the defendant, where certain colts were and in view, and made a note of a levy on them on the execution, it was held good.⁹ And so a levy was held good where the deputy proceeded to the store of the defendants with the execution, and

¹ 23 Wend. 462, *Connah v. Hale*; 14 Wend. 123, *Westervelt v. Pinckney*; 8 Wend. 610, *Phillips v. Hall*; 7 Cow. 735, *Wintringham v. Lafoy*; 6 Barb. 79, *Stewart v. Wells*; 2 Com. 115, *Copley v. Rose*; 31 N. Y. 102, *Bond v. Willett*; 4 Kern. 270, *Barker v. Binninger*; 3 Keyes 398, *Elias v. Farley*.

² 7 Cow. 735, *Wintringham v. Lafoy*.

³ 34 Barb. 553, *Artizan Bank v. Treadwell*.

⁴ 19 Wend. 495, *Ray v. Harcourt*; 3 Wend. 446, *Beekman v. Lansing*.

⁵ 19 Pick. 520, *Donham v. Wild*; 10 O., N. S. 488, *Pugh v. Calloway*.

⁶ 3 Wend. 446, *Beekman v. Lansing*; 23 Wend. 490, *Greene v. Burke*.

⁷ 8 Wend. 445, *Spoor v. Holland*.

⁸ 11 Wend. 548, *Butler v. Maynard*; 14 Wend. 123, *Westervelt v. Pinckney*.

⁹ 23 Wend. 490, *Greene v. Burke*.

informed them of his business, and exhibited the execution and endorsed a levy of the goods upon it, while in the store, but left the goods with the defendants, though a bona fide purchaser bought the goods,¹ And a levy was held good where the officer went to the execution debtor's store, saw the goods, asserted his right to them by virtue of his levy in the hearing of one of the debtors, and subsequently the fact that a levy had been made was endorsed on the execution.²

§ 437. Where the officer went to the defendant's house with an execution and informed him of it, but made no declaration that he levied, and did no act to indicate such intention, nor to enforce the execution for eleven months thereafter, it was held that there was no valid levy by him.³ Making actual levy on part and including other property in the inventory not in view of the officer, is not such a levy upon the latter property as will secure a priority in competition with other executions or bona fide purchasers,⁴ although the property be designated by the defendant and entered with his assent upon the inventory.⁵ Thus, where the sheriff sat upon his horse in the road, and did not see the property, nor know where it was, but the defendant named it over to him, and the officer made a memorandum of it, it was held that the levy, although sufficient as against the judgment debtor, was not an actual levy so as to affect persons acquiring title subsequently derived from the judgment debtor.⁶ And where a deputy holding an execution went with the defendant to a field to levy, and a memorandum was made, partly by the deputy and partly by the defendant, of the property levied on, amongst which there was entered by the defendant, "five head of horned cattle," three of which were in the field with them, and the others, a yoke of oxen, were in another field about eighty rods distant, out of sight of the deputy by reason of an intervening hill, and were not seen by him, and such cattle were allowed to remain with the defendant, who about a month afterwards sold them without informing the purchaser of the levy, it was held, that whatever might be the effect of such a levy as regarded the defendant, it was not a valid levy as against such bona fide purchaser, and the sheriff could not recover against him for taking such oxen.⁷ And where the officer merely seized a few articles outside of a warehouse and proclaimed a levy upon the goods locked up in the store, the levy was held good only as to the articles seized. The

¹ 29 How. 47, *Bond v. Willet*; S. C. 31, N. Y. 102.

² 29 N. Y. 471, *Roth v. Wells*.

³ 14 Wend. 123, *Westervelt v. Pinckney*.

⁴ 19 Wend. 495, *Ray v. Harcourt*; 20 Wend. 41, *Dubois v. Harcourt*; 2 Hill 666, *Van Wyck v. Pine*.

⁵ 9 Barb. 619, *Dresser v. Ainsworth*; 19 Wend. 495, *Ray v. Harcourt*;

20 Wend. 41 *Dubois v. Harcourt*; 2 Hill 666, *Van Wyck v. Pine*.

⁶ 9 Barb. 619, *Dresser v. Ainsworth*.

⁷ 2 Hill 666, *Van Wyck v. Pine*.

officer ought in such case to have broken into the store.¹ And where the officer went into a store owned by a judgment debtor, and looked around, but did not take possession of the goods, or assert a right to seize them by act or word, and went off leaving the goods in the possession of the defendant, who continued to sell as before, though he afterwards make a memorandum of a levy and put in it the execution, it was held that it would not constitute a valid levy.²

§ 438. Where the execution is against one member of a firm for his individual debt, the sheriff may levy upon, take possession of, and remove the goods of the firm. In such case he seizes all the property and not a moiety.³ But though the sheriff may seize the entire goods, he can only sell the moiety or share of the defendant therein, yet he may deliver the whole goods, sold to the purchaser, who takes them as joint tenant with the other partners, and subject to account for the full value in favor of the partnership creditors. If the sheriff sells the whole goods he will be a trespasser.⁴ If there be a separate execution against each partner, the officer seizes the whole property and sells together the one moiety under the one execution, and the other moiety under the other.⁵ If upon a levy upon partnership property, under an execution against one partner, the other partners receipt the property, it is no answer to an action against them on the covenant that the property was partnership property and had been, subsequent to the covenant, applied to the use of the partnership.⁶ Where there is a levy by one execution, on the interest of one member of the firm, and another execution comes to the sheriff's hands against the firm, the latter execution must be paid first; but if a sale has been had on the former and not on the latter, the first execution takes the proceeds.⁷ So if a chattel be owned in common, on an execution against one part owner, the sheriff can only sell the debtor's shares.⁸ But he may

¹ 16 John. 287, Haggerty v. Wilber.

² 5 Denio 198, Camp v. Chamberlain.

³ 2 John. Ch. 548, Moody v. Payne; 15 John. 179, Mersereau v. Norton; 16 John. 102, Matter of Peter S. Smith; 12 Wend. 131, Schrugham v. Carter; 21 Wend. 605, Acker v. Burrall; 23 Wend. 606, Burrall v. Acker; 24 Wend. 389, Phillips v. Cook; 2 Hill 47, Waddell v. Cook; 3 Denio 125, Walsh v. Adams.

⁴ 10 Wend. 318, Wheeler v. McFarland; 3 Denio 125, Walsh v. Adams; 2 Hill 47, Waddell v. Cook; 2 Barb. 633, Fiero v. Betts; Watson 182; Allen 154; 34 Ala. N. S. 722, Andrews v. Keith; 37 Miss. R. 635, Atwood v. Meredith; 20 Ill. 214, Neary v. Cahill; 15 Ill. 58, Herod v.

Bartley; 23 Ill. 202, James v. Stratton; 38 Ill. 160, White v. Jones; Mor. (Ia. R.) 434 Edgar v. Caldwell; 12 Cal. 191, Jones v. Thompson; 4 Nev. R. 361, Lawrence v. Burnham; 7 Allen, (Mass.) 416, Hayden v. Binney; 4 Minn. 217, Caldwell v. Anger; 25 Me. 196, Lathrop v. Arnold; 21 Ga. 395, Shaw v. McDonald; 26 Mo. 77, Wiles v. Moddax. But see 27 N. H. 153, Garvin v. Paul; 4 Nev. 361, Lawrence v. Burnham.

⁵ Watson 182; Graham's Pr. 380; 5 John. Ch. 320, Brinckerhoff v. Marvin; 4 Hill 158, Birdseye v. Ray.

⁶ 23 Wend. 606, Burrall v. Acker.

⁷ 21 Wend. 676, Fenton v. Folger.

⁸ Allen 156; 15 Mass. 82, Melville v. Brown.

take possession of the whole property, and deliver it to the purchaser. Where the sheriff seizes on an execution against one, goods owned by two as tenants in common, and the latter afterwards purchases the interest of his cotenant therein, the sheriff may advertise and sell the entire interest or property in the goods without making a new levy.²

§ 439. If the execution is against two or more joint debtors, where service of the process by which the suit was commenced, was not made upon all of the defendants, the attorney issuing the execution shall endorse thereon the names of such of the defendants as were not served with the process and shall direct in such indorsement that such execution shall not be served upon the person of any defendant whose name is endorsed thereon, but that it may be collected of the personal property of any such defendant, owned by him as a partner with the other defendants taken, or with any of them.³ And if the sheriff shall levy on the separate property of one not so served, in violation of the directions so indorsed on the writ, the goods are not in the custody of the law so as to preclude a rightful levy on them by another execution.⁴

§ 440. A mere levy, even upon sufficient personal property to pay the execution, never amounts to a satisfaction of the execution. It but suspends the other remedies to the plaintiff.⁵ It may be overreached by some other lien, or abandoned for the debtor's benefit, or defeated by his misconduct, and then such levy is no satisfaction of the judgment or execution. There can be no satisfaction of the execution where the defendant has neither paid the debt nor lost his property by the levy.⁶ And a levy by a creditor of one member of an insolvent firm, upon property of the firm, intrinsically sufficient to satisfy the debt, is not a satisfaction.⁷ But if the goods levied on be sold effectually, so as to divest the debtor's title, the execution is satisfied to the extent of the proceeds. And if they are injured, destroyed or lost, by the misconduct or negligence of the officer while in the custody of the law, the debt is paid to the extent of the value of the property lost or destroyed, or the injury done.⁸

§ 441. If after a levy, goods are replevied by a third person, they

¹ 2 Barb. 633, *Fiero v. Betts*.

² 4 Hill 153, *Birdseye v. Ray*.

³ 3 R. S. 660, §§ 3, 4.

⁴ 2 Hill 204, *Sherry v. Schuyler*.

⁵ 1 Denio 574, *The People v. Hopson*;

23 Wend. 490, *Green v. Burke*; 2

Hill 329, *Ostrander v. Walter*; 5

Denio, 447, *Waddell v. Elmendorf*.

⁶ 2 Com. 451, *Peck v. Tiffany*; 26 Mo. 303,

Blackburn v. Jackson; 41 Miss. 348, *Wade v. Watt*.

⁷ 7 Barb. 341, *Muir v. Leitch*.

⁸ 1 Denio 574, *The People v. Hopson*; 1 Sandf. Ch. 195, *Hayden v. Agent of Auburn State Prison*; 2 Com. 451, *Peck v. Tiffany*; 7 How. (Miss.) 386, *Kershaw v. The Merchants Bk. of N.Y.*; 14 O. 538, *The State v. Myers*.

cannot be levied upon again as the defendant's property, though he has been permitted to repossess them.¹ But if the person replevying the goods dies pending the action, it abates, and the sheriff may retake the goods and sell them on the execution.² But if third persons have acquired rights under the replevin, the lien of the execution is gone. And where property is levied on and sold under a junior execution, before a senior one is levied, it cannot be again levied upon and sold under the senior execution, but the proceeds must be applied to such senior execution.³ Where the sheriff misconstrues instructions received from a plaintiff in an execution, and relinquishes a levy he may, even after the return day of the execution retake the property, though in the meantime it has been transferred by the defendant to other creditors for preexisting debts, but who have not taken possession of the same.⁴ And where a levy has been made through the instrumentality of one of the defendants, by inducing the sheriff to disregard the instructions given by the plaintiff's attorney, and such levy is likely to involve the plaintiff in a litigation, the levy may be released and the property of other defendants in the execution levied on.⁵ And so where an officer has been induced to relinquish a levy by one claiming the property as his own, the sheriff has been allowed, even after a return of the execution nulla bona, to have such return stricken out, that he might retake the property so released, or to bring an action therefor.⁶

§ 442. A valid levy by the sheriff, or a deputy, under one execution, is a good and sufficient levy for all the executions then in the hands of the sheriff, or any of his deputies, the return day of which has not then passed, and for all other executions which may come to the hands of such sheriff or any of his deputies, while such levy continues. And it will not vary the rule that the execution under which the first levy was made has become dormant in the sheriff's hands as against subsequent executions, by reason of instructions to delay, and that the property has been removed beyond the reach of the sheriff, or beyond the state.⁷ But if the first levy is invalid, it does not enure to the benefit of a second execution; as where grass growing upon the land of the judgment debtor is levied on under one execution, neither the execution under which the levy is made, nor any subsequent one can hold it, even after the grass is cut, unless it be so

¹ 25 Wend. 614, *Acker v. White*.

² 6 Hill 558, *Burckle v. Luce*; 1 Com. 163, S. C.

³ 2 Com. 451, *Peck v. Tiffany*.

⁴ 1 Wend. 365, *Colton v. Camp*.

⁵ 22 Wend. 569, *Godfrey v. Gibbons*.

⁶ Ante, § 43.

⁷ 17 John. 116, *Cresson v. Stout*; 5 Cow. 390, *Russell v. Gibbs*; 1 Hill 559, *Van Winkle v. Udall*; 11 Paige 21, *Slade v. Van Vechten*; 1 Barb. 542, *The Bank of Lansingburgh v. Crary*; 2 Com. 451, *Peck v. Tiffany*; 41 Ill. 65, *Leach v. Pine*.

cut in the life time of such execution. But if the return day of such first execution is passed, and the grass is then cut, and another execution is received by the sheriff, such last execution will hold.¹ So where a levy has been made on the separate property of a joint debtor, who was not served with process for the commencement of the action, in violation of the indorsement upon the execution, such levy will not enure to the benefit of another execution against the same defendant.² Where there is a valid levy upon one execution, the sheriff may advertise and sell upon all the executions in his hand. But if he advertise upon one only he cannot sell upon all.³ If the sheriff levy and sell goods under the execution last delivered, the property is bound by the sale, and a levy cannot be made on the same property by the execution first delivered.⁴ But if he has merely seized and sold under the last execution, and has not paid over the moneys, he may apply the levy or the proceeds of the sale to the first execution,⁵ otherwise the plaintiff in the first execution has his remedy against the sheriff.⁶ And if the sheriff have two executions, and on one the return day is past, and he levies under it before the return day of the junior execution, he cannot apply the proceeds of the sale of the first execution, but he must apply them to the payment of the last one. Where two executions are received at the same time, in favor of different defendants, and for different amounts, they are not to be paid pro rata, out of the proceeds of the sale of personal property, but dollar for dollar until the lesser one is paid, and then the balance is to be applied on the other.⁷

§ 443. Though the sheriff may, if he chooses, leave property levied upon by him with the defendant, it will be at his risk if it is lost or destroyed, unless by the act of God, or of the public enemies. He should therefore, for his security and protection, cause the property levied on to be removed, or a person to be put in possession. Or, if it is left with the defendant, he should obtain the plaintiff's assent thereto, or take a receipt for the property of some one or more responsible persons, upon the inventory made by him, to the effect that he or they have received the property from the sheriff, who has levied upon the same, and that they will return such property to the sheriff, and every part thereof, on demand, or pay the debt; which receipt will be a valid agreement, and will not be within the statute

¹ 1 Barb. 542, *The Bank of Lansingburgh v. Crary*.

² Ante § 439.

³ 3 Cow. 334, *Mascraft v. Van Antwerp*; 4 Cow. 461, *Marsh v. Lawrence*.

⁴ 2 Com. 451, *Peck v. Tiffany*; 4 Cow. 461 *Marsh v. Lawrence*.

⁵ *Watson* 176; 2 Com. 451, *Peck v. Tiffany*.

⁶ 4 Cow. 461, *Marsh v. Lawrence*.

⁷ *Graham's Pr.* 384; 1 Cow. 215, *Campbell v. Ruger*.

against taken bonds by color of office.¹ But the security should not be beyond the sheriff's own legal liability for the goods upon the execution, or it may be void.² Notwithstanding such covenant, the sheriff has the right to repossess himself of the property, whether it be in the hands of the receptor or any other person, either to sell or return to the defendant on the payment of the execution.³ If the goods are not forthcoming, on demand by the sheriff, the undertaking or receipt, if it be for the whole debt, is a payment of the judgment and execution, and satisfaction of the debt, even though the property was insufficient to pay it. In such case the officer cannot seize other property of the defendant; he can only look to his receipt or undertaking, and it will be immaterial whether he has been able to recover anything on it or not.⁴

§ 444. The same rules in reference to breaking into dwellings in the case of arrests in civil matters, apply to the making a levy under an execution against property.⁵ And what constitutes a dwelling house, and what the outer door, are the same in both cases. The officer cannot break the outer door of a dwelling, and if he does break in, he cannot enter in to levy.⁶ And in such a case even a visitor at the house may lawfully resist him.⁷ Nor can he open the door, though it be only latched, nor enter when the family is absent, against the known wishes of the occupant.⁸ And this protection extends to the same persons as in the case of arrest;⁹ and even to a guest within the house, unless he has gone there to avoid process held by the sheriff; in which case, the latter, after demanding leave to enter, may break the outer door.¹⁰ But the officer may enter the defendant's house, or that of a stranger, when the door is open, and seize the goods of the defendant found therein, liable to execution, by night or by day; and if the defendant's goods are in the house of another, who refuses to deliver them after request, the sheriff may break and enter into the house.¹¹ And where a levy had been commenced, and the sheriff left the house, and there was a stay of proceedings, it was held that the order did not prohibit his returning the next day and

21 Wend. 605, *Acker v. Burrall*; S. C. 23 Wend. 606; 3 R. S. 476, § 48; 25 N. Y. 302, *The People v. Reeder*; 38 N. Y. 253, *Cornell v. Dakin*; 27 Maine, 345, *Penobscott Boom Co. v. Wilkins*.

² 5 Hill 588, *Browning v. Hanford*.

³ 23 Wend. 606, *Burrall v. Acker*; 2 Hall 425, *Hawkins v. Kingsland*.

⁴ 12 John. 207, *Hoyt v. Hudson*.

⁵ 6 Hill 597, *Glover v. Whittenhall*.

⁶ 24 Wend. 369, *The People v. Hubbard*; 1 Hill 336, *Curtis v. Hubbard*; 4 Hill

437, *Curtis v. Hubbard*; 1 Dana 605, *Keith v. Johnson*; 47 N. H. 482, *Closson v. Morris*; 3 Har. (Del.) 288, *Boggs v. Van Dyke*.

⁷ 1 Hill 336, *Curtis v. Hubbard*; 17 Vt. 659, *State v. Hooker*; 19 Vt. 152, *Hooker v. Smith*.

⁸ 1 Hill 336, *Curtis v. Hubbard*; 2 Hawks (N. C.) 246, *State v. Armfield*.

⁹ Ante, §§ 312, &c.

¹⁰ 1 Hill 336, *Curtis v. Hubbard*.

¹¹ Allen 169.

making his inventory, and carrying off the goods; and that being denied admittance, he had the right to break the outer door.¹ He may break open a store, warehouse or barn, or any building not actually occupied as a dwelling, nor annexed to a dwelling house, or forming any part of the curtilage, and the inner doors of a dwelling house, trunks, &c., and when necessary, he must do so.² Where it is necessary and proper to break open outer or inner doors or boxes, closets or drawers, demand that they be opened ought first to be made.

§ 445. When the sheriff seizes goods on the defendant's premises, or those of another party, he cannot stay upon such premises above a reasonable time to make his inventory, and to remove the goods, without their consent.³ But if they are seized upon the defendant's premises, and the officer leaves them with the defendant, he may sell them there, and third persons may rightfully attend as bidders.⁴ Where growing crops are levied on, the officer may sell at once, or he may allow them to grow and become ripe and then sell them; and in either case, the officer or purchaser will have the right to take care of them, and to cut and carry them away, and he has a reasonable time in which to do it.⁵ The purchaser succeeds to all the rights of the defendant in respect to the crops, whether the defendant owns the land on which they grew, or occupies it as lessee.⁶

§ 446. When the sheriff has levied upon personal property and afterwards discovers that it, or some part of it, was not subject to the execution, he may release it at any time before sale; and if no other property can be found and the execution is returned unsatisfied, and the sheriff is sued for a false return, it will be a good defence, notwithstanding the levy.⁷ Ordinarily, however, where the sheriff has reason to doubt whether the property belongs to the defendant or not, if he would protect himself against an action for a false return it will be safer to summon a jury to try the title to the property before he releases it. If a jury summoned find that the title is not in the defendant, the sheriff may then require the plaintiff in the execution to give him adequate indemnity, else he may return the execution unsatisfied.⁸ In such case the inquisition is conclusive evidence in favor of the sheriff in an action against him by the plaintiff in the

¹ 6 Hill 597, *Glover v. Whittenhall*.

² 16 John 287, *Haggerty v. Wilber*.

³ *Watson* 174.

⁴ 1 Denio, 574, *The People v. Hopson*.

⁵ *Watson* 180, *Sewell* 241; 2 John. 418, *Whipple v. Foote*; 17 John. 128, *Hartwell v. Bissell*.

⁶ 2 John. 418, *Whipple v. Foote*; 17 John. 128, *Hartwell v. Bissell*.

⁷ 43 Barb. 373, *Lummis v. Kasson*.

⁸ 8 John. 143, *Bayley v. Bates*; 15 John. 147, *Van Cleef v. Fleet*; 10 John. 98, *Townsend v. Phillips*; 7 Wend. 336, *Platt v. Sherry*.

execution for a false return where he acts in good faith. Where the sheriff however is sued by the real owner of the goods for taking them, the inquisition though against the claimant, does not settle the right of property and can only be given in evidence by the sheriff to show that he had not acted maliciously and by way of mitigating damages. It is not a justification to the sheriff for taking a stranger's goods though the jury find the property not his.¹ If the plaintiff furnishes the indemnity, the sheriff is bound to proceed and sell the property notwithstanding the finding of the jury;² or show in an action against him for a false return that the finding of the jury was erroneous. The plaintiff is never bound to indemnify the sheriff against a levy. But if he neglects or refuses to do so after an inquisition of a jury by which it is found that the title to the property is in the claimant and not in the defendant, he cannot contradict the inquest in an action against the sheriff for a false return.³

§ 447. The proceedings on an inquest to determine the title are usually conducted by the plaintiff or his attorney. But the plaintiff may decline to interfere and so to throw the entire responsibility on the sheriff. In such case the sheriff fixes the time and place of hearing and gives notice to the claimant, the plaintiff's attorney and the defendant, and summons twelve qualified jurors; and subpœnas are issued in the action in which the execution is issued. The sheriff presides and swears the jurors and witnesses, but he takes no part in the determination of the question. The jury after hearing the testimony should deliberate apart from all other persons, as in other cases, and should make and sign an inquisition in which they should state in whom they find the property to be. The sheriff should also sign the inquisition.⁴

§ 448. Where a levy is made, and the officer takes the goods into his possession, he is bound to exercise ordinary diligence in taking care of them. Where there is no negligence on his part, he is not liable for losses by theft, robbery, fire or other accident.⁵ But if he keeps them in an unsafe place, and exposes them to destruction, he acts contrary to his duty, and will be liable in case they are destroyed.⁶

¹ Graham's Pr. 371; 23 Cal. 122, Sheldon v. Loomis; 8 John. 143, Bayly v. Bates; 10 John. 98, Townsend v. Phillips; Allen 152.

² 1 Hall 579, Williams v. Lowndes; 8 Cow. 65, Curtis v. Patterson; 7 Wend 236, Platt v. Sherry.

³ 8 Cow. 65, Curtiss v. Patterson.

⁴ Ante, §§ 164, 172; 3 J. J. Marsh (Ky.) 127, Phillips v. Harris; 3 Bibb (Ky.) 253, Terrill v. Cockerel; 28 Cal. 122, Sheldon v. Loomis; 8 O. 369, Patty v. Mansfield.

⁵ 5 Hill 588, Browning v. Hanford; 6 John. 9, Jenner v. Joliffe; 9 John. 381, Jenner v. Joliffe. But see 44 Penn. 510, Hartlieb v. McLane's adm'r.; 37 Penn. 187, Mitchell v. Commonwealth; 2 Ind. 47, Stewart v. Nunemaker; 5 Allen (Mass.) 33, Dorman v. Kane.

⁶ 9 John. 381, Jenner v. Joliffe; 2 Com. 451, Peck v. Tiffany; 21 N. Y. 103 Moore v. Westervelt.

And it has been held that if he negligently injures a horse levied on by him, it is a satisfaction of the execution to the extent of the injury.¹ He must be diligent to keep the goods, but he is not an insurer and is not like a common carrier, answerable for loss by fire.² Where however, the property is destroyed or lost, in order to excuse himself from liability, he is required to give clear and satisfactory evidence that it was not occasioned by his neglect, or the want of such care as a prudent man would take of his own property. And his return to the execution of facts by way of excuse will not be sufficient. They must be proved in the ordinary way.³ But where he leaves the property with the debtor, whether he takes a receipt or not, he will not be exonerated from liability where the property is destroyed, unless it is so destroyed by the act of God, or the enemies of the country;⁴ or unless it was left with him by the plaintiff's direction, or where the plaintiff selected the receptor himself.⁵ When the sheriff parts with goods levied on, and which are liable to the execution, he is answerable for the value; or if sold, for the amount bid, whether he has received it or not of the purchaser.⁶ But a plaintiff is not bound to pay his own bid, but it may be applied on the execution, unless there is a surplus; and when there is no dispute as to whom the money should go, the sheriff may deliver the property bid in by him, and if the judgment is reversed, the officer is not liable to the other creditors for the money, unless there was a surplus.⁷ But if there is such dispute, the sheriff should refuse to receive his bid, or should detain the property till paid for. If however, he does deliver it, he cannot maintain an action against the plaintiff for his bid.⁸ Where he is sued for not paying over the proceeds of goods levied on or sold, he may show that the same were not liable to the execution.⁹ Or that there had been a recovery had against him by the true owner, for a sum exceeding the amount made on the execution; and it makes no difference that he has been indemnified and has sued on the indemnity.¹⁰ And where he returns that he has made the money and is ready to deliver it to the plaintiff, that is sufficient to charge him with it, though no money was actually received by him.¹¹ Where the sheriff makes a levy, and the property is removed by the defendant, the court will, on notice to the defendant allow a new execution to issue in behalf of the sheriff, saving the rights

¹ 1 Denio 574, *The People v. Hopson*.

² 5 Hill 588, *Browning v. Hanford*;
5 Denio 586, *Browning v. Hanford*.

³ 5 Denio 586, *Browning v. Hanford*.

⁴ *Id.*; 8 La. Ann. R. 139, *Byrne v. Anderson*.

⁵ 19 Pick 520, *Donham v. Wild*.

⁶ 9 John. 96, *Denton v. Livingston*.

⁷ 19 John. 84, *Nichols v. Ketcham*.

⁸ 5 Cow. 390, *Russel v. Gibbs*.

⁹ 7 Wend. 259, *Every v. Edgerton*.

¹⁰ 21 Wend. 264, *Newland v. Baker*.

¹¹ 8 John. 20, *Doty v. Turner*.

of subsequent incumbrances attaching after the removal of such property.¹

§ 449. An actual or constructive levy² under an execution is necessary in order to vest the property in the sheriff.³ Where such levy is made, or the goods and chattels of a debtor are attached by an officer, they are in the custody of the law until the proper time for a sale, and for a reasonable time after the sale to allow the purchaser to remove them; and during this time they are beyond the reach of seizure by any other execution or attachment or distress, even for taxes, though they remain in the possession of the debtor, the party who is liable to pay the same.⁴ By the seizure, the officer acquires a special property in the goods, and may maintain an action against any one for taking them away, whether he left them with the defendant or had taken a receiptor.⁵ The sheriff's indorsement of a levy upon the execution is sufficient evidence, *prima facie*, to prove the levy, and to identify the property.⁶ And if such indorsement is not sufficient in this respect, the officer may, at any time before the execution is filed, amend such indorsement of levy so as to specify with certainty the property levied on.⁷ But if the levy is not valid by reason of any irregularity therein;⁸ or the property is not subject to levy at the time, as grass, or fruit, or trees growing;⁹ or where the levy is upon the sole property of a joint debtor, who was not served, contrary to the instructions indorsed on the execution, the property is not in the custody of the law so as to prevent a regular levy under another execution.¹⁰ And so where an execution has become dormant in the hands of the late sheriff, or other officer, the new sheriff or any other officer having an execution against the same defendant may levy on such property.¹¹

§ 450. Where the execution is against the goods and chattels, lands and tenements of the debtor, all the goods and chattels, or personal and moveable property of the debtor, in the county liable to execution, must first be levied on and sold before the real estate of such debtor can be advertised or sold, except where the personal property is so

¹ 19 Wend. 79, *The People ex rel. Luther v. Onondaga Com. Pl.*

² Ante, § 442.

³ 9 John. 132, *Bliss v. Ball*; 12 John. 403, *Hotchkiss v. McVicar*.

⁴ 1 Hill 559, *Van Winkle v. Udall*; 4 Hill 158, *Birdseye v. Ray*; 2 Hill 204, *Sherry v. Schuyler*; 10 John. 129, *Van Loan v. Kline*; 17 John. 128, *Hartwell v. Bissell*; 17 Wend. 354, *Gilbert v. Moody*; 20 Wend. 41, *Dubois v. Harcourt*; 10 Peters 400, *Hagan v. Lucas*.

Allen 148; 4 B. Monroe (Ky.) 241,

Rogers v. Darnaby; 8 Wis 315, *Martin v. Watson*; Breese (Ill.) 291, *Garner v. Willis*; 55 Barb. 620, *Benson v. Berry*.

⁶ 8 Wend. 445, *Spoor v. Holland*.

⁷ 8 Wend. 445, *Spoor v. Holland*.

⁸ 5 Denio 198, *Camp. v. Chamberlain*.

⁹ 1 Barb. 542, *The Bank of Lansingburgh v. Crary*.

¹⁰ 2 Hill 204, *Sherry v. Schuyler*.

¹¹ *Graham's Pr.* 383; 5 Cow. 399, *Russell v. Gibbs*; 7 Cow. 560, *Power v. Van Buren*; 5 Denio 198, *Camp. v. Chamberlain*.

inumbered that it will probably produce nothing on the execution.¹ An execution issued by the county clerk upon a transcript of a judgment rendered by a justice of the peace, for the sum of twenty-five dollars or less, must be collected out of the personal property of the defendant, for it is not a lien upon his real estate, any more than a justice's execution in the hands of a constable; and when the personal property of the defendant is exhausted before satisfying such former execution, it must be returned *nulla bona*, for the residue, as in the latter case, though the defendant may have abundant real estate.²

CHAPTER XXV.

OF THE PERSONAL PROPERTY SUBJECT TO LEVY AND SALE ON EXECUTION. ^a

§ 451. Every thing of a personal nature, (except choses in action, articles exempt by law, and certain fixtures) belonging to the defendant in the execution, may be levied on and sold as personal property or goods and chattels.³ This includes any current gold or silver coin belonging to the defendant, which the officer shall pay over and return as so much money collected, without exposing it to sale,⁴ and any bills or other evidence of debt issued by any moneyed corporation, or by the government of the United States, and circulated as money.⁵ The money however must not only belong to, but it must be in the possession or under the control of the defendant. Thus, money deposited in a bank by an execution debtor, cannot be levied on by the sheriff under an execution against the depositor; not even where the amount is counted out by the banker and handed over to the officer. It is in such case the money of the banker and not of the debtor.⁶ And where money has been collected by an attorney and not paid over to the party entitled, it cannot be seized on process against him;⁷ and so of money collected by an officer on execution in favor of

¹ 6 Ind. 429, *Debrich v. The State Bank*; 7 Ind. 622, *Williams v. Reynolds*.

² Code, § 63.

³ 12 Jolin. 220, *Handy v. Dobbin*; *Id.* 395, *Holmes v. Nuncaster*; 4 Bibb

(Ky.) 311, *First v. Miller*; 2 La. R. N. S. 615, *Flower v. Livingston*.

⁴ 3 R. S. 645, § 18.

⁵ 3 R. S. 645, § 19.

⁶ 40 Barb. 220, *Carroll v. Cone*.

⁷ 12 Cush. (Mass.) 137, *Maxwell v. McGee*.

^a Ala.—R. C. 1867, § 2871.

Ark.—Dig. 1858, p. 498.

Cal.—Dig. 1860, p. 195; Laws 1867-8, p. 126.

Fa.—Dig. 1847, p. 358.

Ill.—1 St. 602.

Ia.—Rev. 1860, p. 605.

Ky.—1 R. S. 472.

Me.—R. S. p. 532.

Mich.—St. 1857, p. 1210.

Minn.—Rev. 1866 v. 487.

Mo.—Gen. St. 1865, p. 639.

Neb.—R. S. 473.

Nev.—St. 1867, p. 231.

N. H.—Gen. St. 1867, p. 440.

N. J.—Dig. 1855, p. 247.

N. C.—Rev. Code, 274.

O.—Sup't R. S. 602.

On.—Gen. L. 208.

Penn.—Dig. 1861, p. 429.

Vt.—Gen. St. 1863, p. 362.

Wis.—R. S. 785.

one against whom he holds another execution. It cannot be levied on under the last execution by the sheriff. It is not the money of the defendant until it is paid over to him.¹ But where a constable levied on a horse, which he also attached and a sale was had on the execution, and a surplus was realized, it was held that such surplus was rightfully levied on by the constable under the execution in the attachment suit in his hands.² The franchise of a plank road or turnpike may be levied on and sold under execution;³ also every kind of produce raised annually by labor, whether it is growing or has been gathered,⁴ including hops.⁵ If however the land on which the crops are growing is mortgaged and the mortgage is foreclosed and a sale is had before they are gathered, they go to the purchaser of the land, whether sown by the mortgagor or his lessee.⁶ As a general rule, no levy can be made upon the annual produce of the earth, as grass growing or fruit not gathered, where the execution debtor is the owner of the land. They are parcel of the reality and must be sold as such, and a levy upon trees, fruit or grass under such circumstances, although they should be turned out by the debtor to the officer, would be void. But if the defendant is only a tenant upon the land on which they are growing, then such fruit or grass growing, and even trees not severed, may become personal property and be liable as such to levy and sale on execution, as where the owner of the land in fee, by a valid conveyance sells the trees or grass; or where he sells the land, reserving to himself the trees or grass. But a chattel mortgage on trees or grass growing on land is not such a severance until forfeiture; and then the trees and grass so mortgaged belong to the mortgagee and not to the mortgagor, and may be sold on execution against the former.⁷ Whisky made of the debtor's corn by one who took it

¹ 4 Cow. 461, *Marsh v. Lawrence*; 1 Cranch 117, *Turner v. Fendall*; 6 Cow. 494, *Dubois v. Dubois*; 5 John. 163, *Williams v. Rogers*; 49 Barb. 230, *Carroll v. Cone*; 3 Scam. (Ill.) 452, *Reddick v. Smith*; 24 Ill. 243, *Campbell v. Hasbrook*; 6 H. & J. (Md.) 264, *Harding v. Stevenson*; 14 Wis. R. 291, *Hill v. La Crosse & M. R. R. Co.*; 1 Har. (N. J.) 305, *Craue v. Freese*; 4 Ind. R. 431, *Sibert v. Humphries*; 4 Ind. 321, *Winton v. The State*; 4 Bibb (Ky.) 311, *First v. Miller*; 13 Mo. 467, *Ex parte Fearle*; 1 O. R. 275, *Dawson v. Holcomb*; 3 Cal. 363, *Clymer v. Willis*; 4 Vt. 513, *Pren-tiss v. Bliss*.

² 11 Barb. 345, *Wheeler v. Smith*.

³ 2 R. S. 516, § 169; 9 John. 96, *Denton v. Livingston*.

⁴ 9 John. 108, *Stewart v. Doughty*; 2 John. 418, *Whipple v. Foote*; 17 John. 128, *Hartwell v. Bissell*; 31 Ala. N. S. 526, *McKenzie v. Lampley*.

⁵ 36 Barb. 415, *Frank v. Harrington*.

⁶ 2 Denio 174, *Shepard v. Philbrick*.

⁷ 2 John. 418, *Whipple v. Foote*; 17 John. 128, *Hartwell v. Bissell*; 9 Cow. 39, *Austin v. Sawyer*; 1 Denio 550, *Green v. Armstrong*; 1 Barb. 542, *The Bank of Lausburgh v. Crary*; 1 Denio 580, *Smith v. Jencks*; 9 John. 103, *Stewart v. Doughty*; Breese (Ill.) 231, *Adams v. Smith*; Houston's R. (Del.) State, &c. *Roe v. Gemmill*; 1 Har. (N.J.) 153, *Westbrook v. Eager*; 27 N. J. 177, *Bloom v. Welsh*; 4 Ind. R. 362, *Bricker v. Hughes*.

wrongfully, it has been held, may be seized and sold on execution against the debtor. But it is otherwise if it was so manufactured by an innocent purchaser.¹ And it has also been held that where the materials of a newspaper printing establishment have been levied on, the subscription list might be included.²

§ 452. Choses in action, as notes and accounts, account books, private papers or claims or demands against another cannot be levied on and sold on execution against the owner or holder.³ Nor bank shares nor shares in a public library,⁴ nor the interest of a special partner in the copartnership property on an execution against him; such interest being in the nature of a chose in action.⁵ Personal property, duly mortgaged, of which the mortgagee has the right of possession, or has taken possession thereof, is not subject to a levy and sale against the mortgagor;⁶ property let to hire, can not be levied on by execution against the owner, during the time the property is so hired, and while in the possession and use of the hirer.⁷ Nor the residuary interest of the defendant in goods bona fide assigned by him in trust for the payment of debts or other specific purposes, after the purposes of that trust are satisfied.⁸ Where goods are purchased fraudulently, with intent to subject them to the execution of a judgment creditor, the title does not become vested in the purchaser, and the sheriff cannot levy.⁹ And where one purchased goods for cash, and they were delivered at too late an hour on Saturday to present the bill, but it was presented on Monday morning, when it was found that the sheriff had levied on the goods, it was held that the title had not passed, and that they were not liable to the execution.¹⁰ Where goods are purchased conditionally, on the payment of a fixed price at a given period, and the purchaser is to have the possession, and is to use the property, until he failed to comply with the terms of the purchase, such purchaser has no such title as can be levied on and sold on execution.¹¹

§ 453. Certain articles of a personal nature, when annexed to the

¹ 3 Com. 379, *Salisbury v. McCoon*; S. C. 4 Denio, 332, and 6 Hill 425.

² 1 Cow. Tr. 742.

³ 3 Sandf. S. C. 692, *Ransom v. Miner*; 1 Cow. 240, *Ingalls v. Lord*; 12 John. 220, *Handy v. Dobbin*; 5 Ark. 376, *Field v. Lawson*; 2 Scam. (Ill.) 504, *Greenwood Exr. v. Spiller*; 3 Mich. 509, *Kercheval v. Wood*; Allen 161.

⁴ 9 John. 96, *Denton v. Livingston*; 1 Cow. 240, *Ingalls v. Lord*.

⁵ 28 N. Y. 574, *Harris v. Murray*.

⁶ 1 Com. 295, *Matteson v. Baucus*.

⁷ 11 N. H. 145, *Hartford v. Jackson*.

⁸ 5 John. 335, *Wilkes v. Ferris*.

⁹ *Watson* 205; 15 John. 147, *Van Cleef v. Fleet*; 1 Paige 292, *Durell v. Halley*; 2 Paige 169, *Lupin v. Marie*; 4 Paige 537, *Lloyd v. Brewster*; 23 Wend. 372, *Acker v. Campbell*; Id. 611, *Covill v. Hitchcock*; 26 Wend. 167, *Hitchcock v. Covill*; 1 Hill 311, *Cary v. Hotailing*; 1 Hill 302, *Ash v. Putnam*; Id. 317, *Olmstead v. Hotailing*; Allen 162; *Graham's Pr.* 374.

¹⁰ 23 Wend. 372, *Acker v. Campbell*.

¹¹ 2 Hill 326, *Strong v. Taylor*.

freehold, and which are then designated as "fixtures," are, under certain circumstances, deemed a part of the realty, and can only be levied on and sold under an execution with, and as a part of the land, to which they are so attached. Under other circumstances they are deemed to be personal property, and may be levied on and sold as such.

§ 454. The distinction between what is a fixture and what is not, has never been defined with any reasonable degree of a certainty; and perhaps no sufficient or satisfactory practical rule can be given which will be applicable to all cases. It has been said that a fixture is something of a personal nature, annexed to the freehold, essential to the business or purpose of the erection, and permanently or constantly attached to it in some way; at least it must be mechanically fitted so as in ordinary understanding to make a part of the building itself.¹ And in a late case in Ohio it has been held that the true criterion of a fixture is the united application of three requisites: First, actual annexation to the realty or something appurtenant thereto; Second, application to the use or purpose to which that part of the realty with which it is connected is appropriated; Third, the intention of the party making the annexation to make a permanent accession to the freehold.² And this has been approved by the court of appeals of this state.³ But there are many articles which are never actually affixed to the freehold, yet are from their character considered a part thereof, and pass with the inheritance, as the key of the house, deer in a park, fish in a pond, and doves in a dove house, an ordinary Virginia fence, although it may be temporarily laid up in piles, and manure in a barn yard.⁴ While many other articles that are permanently attached to the building have been held not to pass with the land. A reference to some of the principal cases will best serve to determine what articles are and what are not considered subject to levy and sale when they are in any way connected with the land.

§ 455. The following articles, though they may be affixed to the freehold, have been determined not to be fixtures, and may be levied on and sold, whether owned by the owner of the land or by a tenant thereof: Machinery,⁵ if not attached,⁶ or though attached, if it may be removed without injury to the building or the machinery;⁷ carding machines in a woolen factory not attached to the building, but con-

¹ 20 Wend. 636, Walker v. Sherman;
10 Barb. 157, Vanderpool v. Van
Allen.

² 1 McCook (O.) 511, Teaff v. Hewitt.

³ 40 N. Y. 287, Potter v. Cromwell.

⁴ 20 Wend. 636, Walker v. Sherman; 15

Wend. 169, Middlebrook v. Corwin;
2 Hill 142, Goodrich v. Jones.

⁵ 11 Vt. 433, Sturgis v. Warren.

⁶ 20 Wend. 636, Walker v. Sherman.

⁷ 9 Conn. 63, Swift v. Thompson.

nected merely by the bands;¹ spinning frames and carding machines in a mill, the former fastened to the upper floor by upright pieces and having cleats nailed to the floor around the feet, and the latter fastened to the floor by wooden pins;² a carding machine situated in a building erected for the purpose of carrying on carding, ready to be put in operation, and standing on the floor in its usual place of operation, but not fastened to the building, is not a fixture, but is subject to a justice's execution. Machinery put in a building after its erection for the purpose of trade, founded on timbers bedded in the earth, and so attached to the building as to be capable of being removed without injury, is liable to an execution as personal property.³ Machinery for making cotton yarn and twine in a cotton mill standing on the floor, over apertures for the passage of leather belts by which it was moved, and which was not fastened to the building except in some cases by cleats fastened to the floor to make it level, and each machine being capable of removal without injury to the building.⁴ Looms in a woolen factory, attached to the floors to keep them steady and driven by a band from the permanent machinery, and which could be removed without permanent injury to the building.⁵ A heater used in a tannery, placed in a vat, which latter is detached from the building, is not a fixture even if put up by the owner of the land.⁶ And so of a bark mill, affixed to the soil;⁷ and a still in a still room. A stove in a house, which leads by a pipe into a chimney from the floor, though there is no fire place in the house, is not a fixture.⁸ Growing crops of all kinds, except grass or trees growing, and fruit not gathered.⁹ But if the land is occupied by a tenant, and the grass or fruit belongs to him, it is personal property.¹⁰ The machinery in a woolen factory, consisting of carding machines, spinning machines, and power looms connected with the steam engine by band but in no wise attached to the building, except by cleats or other means to confine them to their proper places for use and subject to removal whenever convenience or business may require without injury.¹¹ Machinery in a blacksmith's and wagon makers' shop, consisting of a boring lathe, an engine late, a wood turning lathe, a press drill, a press punch, an upright saw and a circular saw, all driven by water, which though fastened to the building, are only so attached for the

¹ 14 Mass. 352, *Gale v. Ward*.

² 17 John. 116, *Cresson v. Stout*.

³ 5 Denio 527, *Farrar v. Chauffetete*.

⁴ 10 Barb. 157, *Vanderpool v. Van Allen*.

⁵ 18 N. Y. 28, *Murdock v. Gifford*.

⁶ 7 Cow. 319, *Raymond v. White*.

⁷ 6 John. 5 *Hernance v. Verney*.

⁸ 24 Wenl. 191; *Freeland v. Southworth*

⁹ 2 John. 418, *Whipple v. Foot*; 9 John. 108, *Stewart v. Dougherty*; 1 Barb. 542, *The Bank of Lansingburgh v. Cray*; 2 Barb. 613, *Warren v. Leland*.

¹⁰ 1 O. St. 511, *Teaff v. Hewitt*.

¹¹ 32 Vt. 372, *Bartlett v. Wood*.

purpose of making it firm for use in its places and which could be removed without seriously injuring the building.¹ Gas fixtures, such as chandeliers and side brackets, put up and attached to the gas pipes by the owner of the premises²

§ 456. But the following articles of personal property have been held to be fixtures, when put up and owned by the owner of the land, and of course, cannot be sold on execution against such owner, as personal property, separate from the land to which they are attached. A portable grist mill attached as a permanent improvement of the land.³ A cotton gin erected in a house and attached to it by nails and braces;⁴ a steam engine and apparatus placed on the premises by the owner and attached to the freehold;⁵ the mill chain, dogs and bars of a saw mill, being in their appropriate place;⁶ a clapboard machine and shingle machine fastened with a saw mill;⁷ a marine railway consisting of iron and wooden rails and sleepers, endless chained gear, wheels and ship cradle, constructed in the usual manner.⁸ The water wheel, stones, even while removed for the purpose of being picked, running gear, bolting apparatus and machinery of a grist mill;⁹ the engine of a steam saw mill;¹⁰ a clap board and shingle machine fastened into a saw mill to be there used;¹¹ the rolls of an iron rolling mill, as well as iron plates with which the floor is covered, and which are indispensable parts of it, though not manufactured for the purpose;¹² a steam engine and boilers, and machinery adapted to be moved by such engine by means of connecting bands and gearing which are placed in a building designed for the purpose of manufacturing steam engines and other heavy iron work;¹³ a steam engine with all its fixtures used to drive a bark mill in a tannery, and also the bark mill; a cotton gin in a gin house on a plantation, attached by gears; a kettle in a fulling mill, set in brick;¹⁴ a potash kettle set in an arch of masonry with a chimney, though the arches are placed on a platform and fastened to the buildings; but small kettles not fixed in any way, though necessary for the use of the ashery are not;¹⁵ where a house was built for a distillery, the still set in brick work

¹ 33 Penn. 522, *Vaughan v. Haldeman*.

² 40 N. Y. 287, *Potter v. Cromwell*.

³ 4 Humph. (Tenn.) 516, *Saunders v. Fuller*.

⁴ 4 Har. (Del.) 332, *Rice v. Adams*.

⁵ 6 Me. 154 *Farrar v. Stackpole*.

⁶ 28 Me. 545, *Trull v. Fuller*.

⁷ 55 Me. 263, *Strickland v. Parker*.

⁸ 1 Denio 530, *Smith v. Jenks*; 1 Com. 90, *Jencks v. Smith*.

⁹ 10 Paige 158, *House v. House*; 20 Wend. 636, *Walker v. Sherman*.

¹⁰ 3 Watts (Penn.) 140, *Morgan v. Ar-*

thurs; 7 Watts (Penn.) 107, *Oves v. Aylsby*.

¹¹ 15 Shep. (Me.) 545, *Copeland v. Copeland*; 16 Shep. (Me.) 115, *Curtiss v. McLagin*.

¹² 2 Watts & S. (Penn.) 119, *Voorhis v. Freeman*; 2 Watts & S. (Penn.) 330, *Pyles v. Pennock*.

¹³ 4 Met. (Mass.) 306, *Winslow v. The Merchants Ins. Co.*

¹⁴ 15 Mass. 159, *The President, &c. of Union Bank v. Emerson*.

¹⁵ 6 Cow. 665, *Miller v. Plumb*.

and let into the ground, the pumps, cisterns, iron grating, door, distillery and horse mills, were held a part thereof, but not the joists, vats, buckets, pickets and faucets;¹ a dye house and kettles secured in a brick arch;² the kettles set in brick work in a fulling mill; a copper kettle in a brew house; also all fences whether accidentally or temporarily detached, unless it is the intent of the owner to divert them;³ hop poles used on the farm, though taken down to gather the hops and piled in the yard, with the intention of being again used in the proper season;⁴ growing grass, fruit and trees;⁵ a strawberry bed in full bearing, though purchased from a former tenant; and a border of box, which is not grown for sale by a gardener; manure in the ordinary course of accumulation on the farm, whether made by the owner of the land or a tenant, and whether in heaps or scattered about the farm.⁶ The permanent stage of a theatre has also been held to be a fixture, but not the moveable scenery and flying stages.⁷

§ 457. The stones of a grist mill, though removed for the purpose of being picked,⁸ are still fixtures; and so of saws in a mill, and where there are two sets, the one may be at work while the other is sharpening, and yet both are fixtures;⁹ and so if a copper, which is a fixture, has another cover, that is a fixture also;¹⁰ so where the stones and irons of a grist mill were accidentally detached by a flood, carrying away the main body of the mill, they were still holden to be a part of the realty, and not seizable on execution.¹¹ So where a tenant severs machinery in a mill, demised to him for a term of years, without the landlord's consent, it cannot be seized on execution against the tenant.¹²

§ 458. Chattels which would become fixtures, under ordinary circumstances, when annexed to the land, may by the agreement of the parties retain the character of chattels notwithstanding such annexation. But it has been held that whether they should be held fixtures or chattels would depend not alone on the agreement, but whether the articles could be removed without injury to the building to which they may be annexed. Hence, when salt kettles were mortgaged before they were embedded in brick arches, it was held that inasmuch as they could be removed without injury, by displacing a portion of the brick, they were chattels still and did not pass to the purchaser

¹ 1 Har. & J. (Md.) 289, *Kirwan v. Latour*.

² 19 Pick 314, *Noble v. Bosworth*.

³ 2 Hill 142, *Goodrich v. Jones*.

⁴ 1 Kernan 123, *Bishop v. Bishop*.

⁵ 1 Barb. 542, *The Bank of Lansingburgh v. Cary*; 2 Barb. 613, *Warren v. Leland*.

⁶ 15 Wend. 169, *Middlebrook v. Corwin*;

2 Hill 142, *Goodrich v. Jones*.

⁷ 20 Wend. 636, *Walker v. Sherman*.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 6 Greenl. 427, *Goddard v. Bolster*.

¹² Allen 160.

of the land.¹ And so it has been held as to a steam engine and boilers, in a building put up for the same, as an auxillary to water power, placed upon solid brick foundations, the engine and boilers fitted into such foundation, with a stack or brick chimney one hundred feet high.²

§ 459. Whether the rolling stock of a railroad is a fixture and passes by a mortgage on the road, or is personal property and subject to sale on execution against the company, is not yet authoritatively decided; there being many decisions in this state and elsewhere holding both views.³

§ 460. But all fixtures, buildings and erections, though annexed to the freehold, if put up by a tenant for the purpose of trade or manufacturing or agricultural purposes, may be removed by him, and where he may remove them, they may be levied on by execution against such tenant.⁴ Thus he has the right to remove all furnaces or vats, or coppers of a soap boiler; kettles or boiler of a tannery, put up with brick work in mortar; stills set up in furnaces for making whiskey; salt pans for making salt at salt springs; machinery in breweries, colleries, mills, as steam engines, cider mills and the like. Buildings for trade, as a varnish house; sheds, called dutch barns, formed of uprights rising from a foundation of brick work; a wooden dwelling house, with a cellar of stone or brick, and a brick chimney erected by him for the business of a dairyman and the residence of those engaged in it, and in part improved for carrying on his trade of a carpenter.⁵ A cider mill and press, though fixed to the soil, if erected by a tenant for his use.⁶ So too, he may remove and the same are liable to execution, where the removal will not place the freehold in a worse condition than when the tenant took possession, if not exempt from levy on execution by statute, all fixtures put up as furniture, such as hangings, tapestry, beds fastened to the ceiling, blinds, chimney glasses, chimney pieces, clock cases, coffee mills, looking glasses, pier glasses, pictures, shelves, cabinets, chimney backs, cupboards, desks and drawers, frames, gas pipes, grates, iron chests and iron ovens, iron safes, jacks, lamps, pumps,

¹ 20 N. Y. 344, *Ford v. Cobb*; 5 Hill 116, *Fryatt v. The Sullivan Co.*; 14 Barb. 662, *Goddard v. Gould*; 1 Com. 564, *Mott v. Palmer*; 1 Fairf. 429, *Russell v. Richards*.

² 46 Barb. 242, *Voorhies v. McGinnis*.

³ 51 Barb. 45, *Hoyle v. The Plattsburgh and Montreal R. R. Co.*; 47 Barb. 104, *Bement v. The Plattsburgh & Montreal R. R. Co.*; 25 Barb. 484, *The Farmers' Loan & Tr. Co. v. Hendrickson*; 31 Barb. 591, *Stevens*

v. The Buffalo & N. Y. R. R. Co.; Id. 619, *Beardsley v. The Ontario Bank*; 2 Wall (U. S.) 699, *The Minnesota Co. v. St. Paul Co.*; 32 N. H. 484, *Pierce v. Emery*.

⁴ 1 Denio 91; 20 Wend. 636, *Walker v. Sherman*; 10 Barb. 496, *Dubois v. Kelly*; 1 Hill Abr. 15, 2 Kent Com. 343; *Watson* 179; 1 Barb. 542; 33 Barb. 410, *Kelsey v. Durkee*.

⁵ 1 Hill Abr. 14.

⁶ 20 John. 29, *Holmes v. Tremper*.

ranges, sinks, turret clocks, wainscoats fixed by screws, window sashes, not being bedded into the frames, but merely fastened by laths, and nailed across frames, and curtains.¹ A building erected on the land of another, with his assent, is personal property, and may be sold as such.² Shrubs and trees raised by a nurseryman, on lands held by him as a tenant.³ Rails built into a fence by a tenant, under an agreement that he may remove them are, as between him and the owner, personal property.

§ 461. Where goods or chattels are pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods, of the person making such pledge, may be sold on execution against him, and the purchaser will acquire all the right and interest of the defendant, and will be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.⁴ In such case the sheriff may seize the property and hold it until the sale, but he must only sell the defendant's interest therein, and if he assume to sell the goods absolutely, he will be liable as a trespasser;⁵ and on the sale he must redeliver such property to the pledgee, to whom the purchaser must look. His title is subject to the lien of the former.⁶ Goods pawned may be seized and sold, subject to the lien of the pawnee. So the interest of a lessee of personal property may be sold on execution, and in such case the purchaser stands in the situation of the lessee.⁷ But where by the terms of the lease, the property is to be kept upon particular premises and not removed, a removal in violation thereof works a forfeiture of the lease, and the lessee has no interest that can be made subject to levy and sale.⁸

§ 462. Where goods and chattels owned by the defendant in the execution are mortgaged by him, if, by the terms of the mortgage, he has the right of possession of the property for a definite period, as against the mortgagee, his interest in such property may be levied on and sold, at any time before forfeiture, or before the right of possession of the property accrues to the mortgagee.⁹ But if by the terms

¹ Sewell 234; 20 Wend. 636, Walker v. Sherman.

² 1 Hill 176, Smith v. Benson.

³ 1 Hill Abr. 14.

⁴ 3 R. S. 645, § 20.

⁵ 10 Wend. 318, Wheeler v. McFarland.

⁶ 6 Hill 484, Bakewell v. Ellsworth; 1 Com. 20, Stief v. Hart.

⁷ 2 Cow. 543, Van Antwerp v. Newman;

7 Cow. 752 Hurd v. West; 3 Wend. 500, Otis v. Wood.

⁸ 3 Wend. 500. Otis v. Wood.

⁹ 4 Cow. 461, Marsh v. Lawrence; 3 Wend. 500, Otis v. Wood; 8 Wend. 339, Bailey v. Burton; 10 Wend. 318, Wheeler v. McFarland; 17 Wend. 53, Randall v. Cook; 2 Hill 326, Strong v. Taylor; 4 Hill 271, Hanford v. Archer; 1 Com. 295, Matteson v. Baucus; 1 Barb. 542, The Bank of Lansingburgh v. Crary; 1 Kern. 501, Hull v. Carnley; 25 Ill. 282, Merritt v. Niles; 21 Ind. R. 235, Schrader v. Wolfen; 14 B. Mon. (Ky.) 274, Mercer v. Finsley.

of the mortgage the mortgagee has the right of possession at any time, or he has reduced the property to possession, the mortgagor has no interest therein, but the equity of redemption, which is not alone and unaccompanied by the right of possession, the subject of levy and sale upon execution.¹ And after default in the condition of the mortgage, the mortgagor has no interest in the mortgaged property, subject to execution, for the title has become absolute in the mortgagee. If there is no time of payment specified in the mortgage, or the mortgage provides for an impossible time of payment, or a time anterior to its date, in either case it is payable immediately, and the mortgagee's title is absolute at law.² Where the defendant is the mortgagee of personal property, it may be sold upon an execution against him after forfeiture, although the property still remains in the hands of the mortgagor.³

§ 463. But to render a mortgage a valid lien upon personal property, as against a judgment creditor, it must be for a valid consideration, and be upon property the mortgagor then owns, and not upon property to be subsequently acquired.⁴ And the following provisions must be strictly complied with: Every mortgage or conveyance intended to operate as a conveyance of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, (and the delivery of the property to the mortgagor to take care of as agent of the mortgagee, is not such a change of possession,⁵) shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof, shall be filed⁶ with the clerk of the town or city of this state where the mortgagor, if a resident of this state, shall reside at the time of the execution thereof; and if not a resident, then with the clerk of the city or town where the property so mortgaged shall be at the time of the execution of such instrument. In the city of New York, such instrument shall be filed in the office of the register of said city, and in the several cities in this state, other than the city of New York, and in the several towns in this state, in which a county clerk's office is kept, in

¹ 1 Com. 295, *Matteson v. Baucus*; 3 Wend. 500, *Otis v. Wood*; 38 Barb. 178, *Farrell v. Hildreth*; 23 Ill. 301, *Palmer v. Forbes*.

² 2 Wend. 596, *Divver v. McLaughlin*; 9 Wend. 81, *Langdon v. Buel*; 12 Wend. 61, *Patchin v. Pierce*; 1 Hill 473, *Fuller v. Acker*; 2 Denio 170, *Burdick v. McVanner*; 3 Sandf. 607,

Howland v. Willett; 22 N. Y. 37, *Galen v. Brown*; 3 Keyes 210, *Baltes v. Ripp*; 2 Keyes 217, *Farmers' Bank of Washington Co. v. Cowan*.

³ 9 Wend. 262, *Hatch v. Mann*.

⁴ 4 Com. 581, *Griswold v. Sheldon*.

⁵ 2 Hill 628, *Camp v. Camp*.

⁶ 3 R. S. 222, § 9.

such office ; and the clerk with whom the same is filed shall indorse thereon the time of the filing thereof.¹ If any such mortgage be filed in any different office from that designated, the mortgage will be void.² And every such mortgage shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagor in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register of the town or city where the mortgagor shall reside.³ And an indorsement as follows : "Refiled and renewed the 6th February, 1844," has been held not to be a compliance with this provision, and the property so mortgaged might be levied on and sold by a judgment creditor, notwithstanding such filing and indorsement.⁴ The confession of a judgment for the same debt secured by the mortgage where it is to be held as collateral to the mortgage, does not merge or extinguish the mortgage.⁵ Nor does the taking a second mortgage extinguish the first, unless there be a release express or implied.⁶ A mortgage duly executed and filed in the proper office to secure a bona fide debt, is not void upon its face by reason of a provision therein that until default be made in the payment of the moneys secured thereby, the mortgagor is to remain and continue in the quiet and peaceable possession of the mortgaged property and the full and free enjoyment of the same, though the consideration of the mortgage is but a small part of the value of the property mortgaged, where the possession and use of such property is necessary to the mortgagor in his business.⁷

§ 464. Goods and chattels owned by the defendant, but which he has sold, assigned or incumbered for the purpose of hindering, defrauding or delayed creditors, are liable to be seized and sold upon execution against him, whether the same remain in his hands, or are in the possession of another claiming to be the owner thereof. What will constitute a fraudulent transfer as against creditors is usually a mixed question of law and of fact, and no satisfactory rules can be given for determining it, within the limits of this branch of the subject, as each case must be governed by the particular facts and circumstances which surround it. It may be said generally, however, that where the

¹ 3 R. S. 223, § 10.

² 1 Denio 163, *Fitch v. Humphrey*.

³ 3 R. S. 223, § 11.

⁴ 1 Denio 163, *Fitch v. Humphrey*.

⁵ 1 Com. 496, *Butler v. Miller*.

⁶ 20 Wend. 17, *Gregory v. Thomas*.

⁷ 1 Kern. 501, *Hull v. Carnley*.

defendant is in the possession of property, using it as his own, the officer ought to make a levy; and where a claim is made to such property by another, the sheriff should determine in the best manner he can, whose it is, and whether he should release it or should sell. If, in such case the plaintiff tender him an ample bond of indemnity against any claim, it will be his duty to proceed to sell, unless he chooses rather to incur the risk of proving the property not in the defendant, in any action that the plaintiff may bring against him for not selling. Where the property is not in the possession of the defendant, and it is not clear that it belongs to him, the sheriff need not make a levy unless he has tendered to him by the plaintiff, the most ample indemnity. But generally, where property, not in the defendant's possession is so circumstanced that there is a difficulty in determining whether it be the defendant's or not, the party resorts to other means of redress than by levy. But should that means be resorted to, the sheriff should not only see that his indemnity is good and abundant, but that the property is subject to the execution.

§ 465. Where property has been replevied from a levy, it cannot be releived on unless the party replevying dies, when it may be again levied on by the same execution.¹

§ 466. Though goods in the custody of the law are not subject to levy,² yet if the executions are all in the hands of the sheriff, or of his deputies, a levy upon one execution enures to the benefit of all the others in his hands while such levy continues. But where the levy on the first execution, whether in the hands of the present sheriff or of the late sheriff, or a marshal or constable, is invalid for irregularity,³ or the execution has become dormant by reason of delay; or the officer has levied upon property not subject to the execution, as the property of a joint debtor not served; or where the levy is upon grass growing, or trees not severed, and a subsequent execution comes to the sheriff's hands, he is bound to make a levy notwithstanding such claim of levy by another or by himself.⁴

§ 467. Certain persons may, under particular circumstances, acquire a lien upon the property of another while the same remains in their hands, until the amount of such lien is fully paid, not only as against the owner thereof, but as against his creditors. Such lien however, will not prevent a creditor by execution from levying upon or selling such property during the continuance of such lien; but the levy and sale must be made subject to such lien, or the officer may sell it without regard to the lien, if he will pay the amount thereof to the party

¹ 1 Com. 163, *Burckle v. Luce*.

² Ante, § 449.

³ 5 Denio, 198, *Camp v. Chamberlain*.

⁴ Ante, § 449.

having the lien.¹ But in neither case can the property be taken from the possession or control of the bailor, before payment of the amount of his lien. Some of such liens are regulated by statute and others exist at common law.

§ 468. Of the former class of liens are those created by statute in favor of wreck masters, and other officers and persons aiding them in the recovery of wrecked property, until their salvage and expenses are paid.² This lien however, only exists in favor of the officer. And it only applies to cases of goods lost at sea, and does not extend to a canal boat sunk in the Hudson river, upwards of a hundred miles from sea;⁴ or to timber thrown loose by the flood and washed down stream, though it be on a navigable river.⁶ But if logs, timber, boards or plank have drifted on the lands of another, such person may detain such lumber until he has been paid such damages as may have accrued or may accrue in the removal of such logs, if such damages are determined in the manner pointed out by the statute.⁶ So where any horse, neat cattle or sheep, stray upon the premises of another, who complies with the statute in such case, he shall be entitled to a reasonable charge for their keeping.⁷ So a lien may be acquired upon a ship or vessel, her tackle, apparel, and furniture whenever a debt of fifty dollars or upwards as to a sea-going vessel, or fifteen dollars or upwards as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee, or the agent of either of them for work or materials, provisions or stores furnished within this state; or for wharfage and expenses of keeping such vessel in port, for loading or unloading, or for advances for procuring necessaries for such vessel or for insurance; or whenever a debt of twenty-five dollars or upwards shall be contracted within this state for towing or piloting such vessel, or for insurance of the vessel or freight, and the same shall be preferred to all other liens thereon, except marines' wages.⁸ But such lien shall cease at the expiration of six months after such debt was contracted, unless at the time when said six months expire said vessel shall be absent from the port at which the debt was contracted; in which case it shall not expire until ten days after the vessel shall return to said port; and in all cases such debt shall cease to be a lien when such vessel which shall leave such port unless the claimant shall within twelve days after such departure cause to be filed specifications of such lien, with the amount claimed, to be verified

¹ 2 Denio 628, *Gregory v. Stryker*; 4 ⁴ 7 Barb. 113, *Baker v. Hoag*.

Wend. 292, *Moore v. Hitchcock*; 1 ⁵ 1 Cow. Tr. 335.

Keyes 568, *Truslow v. Putnam*.

² 2 R. S. 962, § 12.

⁶ 2 R. S. 970, §§ 1-6.

⁷ 1 R. S. 831, § 21.

³ 3 Barb. 208, *Baker v. Hoag*.

⁸ 4 R. S. 650, § 1.

by such person, his representatives, agents or assigns,¹ in the office of the clerk of the county where the debt was contracted, except when contracted in either of the counties of New York, Kings or Queens, when it shall be filed in the office of the clerk of the city and county of New York.² So the like lien is created in favor of any owner of any ship or vessel, injured by any other vessel to the extent of fifty dollars or upwards. But such lien shall cease unless a warrant shall issue as prescribed in the statute within ten days after the damage shall be done.³

§ 469. The class of liens recognized by the common law, are those which are given for the convenience and enjoyment of trade; and in favor of mechanics or manufacturers, tradesmen and agents who have expended money or labor upon property in their hands for the owner.⁴ And the lien of the former will attach to such property, although the materials and part of the expense bestowed upon it were furnished by the owner; as where a brick maker agreed to make brick for the owner of the yard, who was also to furnish the sand and all other necessities, and to pay for the work on the return of the vessel.⁵ And even where there is a special agreement as to the mode of payment, which is violated on the part of the owner, without fault of the manufacturer, it will not do away with the lien given him by the common law.⁶ A common carrier may detain goods till paid for carrying them, and he can detain all the goods carried, until his whole claim is paid;⁷ and so in the case of a workman, the lien extends to all the goods delivered under one contract, and not merely to the particular portion on which labor has been bestowed.⁸ Innkeepers have a lien upon the goods of a guest, who is either actually or constructively so at the time.⁹ But it will be sufficient where one sends his horse or trunk in advance to an inn and says he will soon be there himself. And so if he left his horse at the inn to be fed and cared for while he went to a friend's to dine, or to a neighboring town to remain a few days and return. But it would be otherwise in such case if the property was inanimate from which the landlord derived no advantage in the way of trade. And the innkeeper has such lien though the horse be a stolen one, if he did not know the fact. But if the horse is that of a neighbor, left there to be kept, the latter having the right to use him at pleasure,

¹ 4 R. S. 651, § 1.

² 4 R. S. 651, § 2.

³ 4 R. S. 657, § 33.

⁴ 3 Hill 485, Grinnell v. Cook; 4 Wend. 292, Moore v. Hitchcock; 11 Wend. 77, Mount v. Williams; 2 Kent 635; 4 Com. 552, Morgan v. Congden.

⁵ 4 Wend. 292, Moore v. Hitchcock.

⁶ 11 Wend. 77, Mount v. Williams.

⁷ 2 Kent 635.

⁸ 4 Com. 552, Morgan v. Congden.

⁹ 3 Hill 485, Grinnell v. Cook.

no lien attaches in favor of the landlord.¹ The above cases are those where the lien is said to be specific or particular; that is, where the party has but a lien upon the specified piece of property for the money, or labor bestowed upon it, and is distinguished from a general lien, which is where the party has a lien upon all the property of the bailor in the bailee's hands, for any moneys due him. In general, specific or particular liens only continue while the property is in the possession of the party entitled thereto. And if he parts with the possession thereof before payment, he loses his lien; as where the owner of a saw mill is to have a lien upon the boards sawed until paid for, and he allows them to be placed on the banks of the canal half a mile from his mill, his lien is gone as to third persons, although it is agreed between the parties, that the same should continue.² So the lien will be lost if he permits the goods to be taken out of his possession, though restored to him again. And where an innkeeper has a lien upon several horses belonging to the same person, he cannot have a lien upon one left, for the charges against the others after they are taken away.³ It has been decided that attorneys, bankers, brokers, calico printers, factors and fullers, in some places, and packers and wharfingers, have by custom a general lien.⁴ As such lien, whether specific or general, is intended for the convenience and enjoyment of trade only, it does not apply where the services or expenses incurred are not within the scope of some particular branch of commerce or trade. Thus a farmer or stable keeper who receives horses to feed or care for, has no lien upon them, because the services are not those of a tradesman. Livery stable keepers have no lien unless by special custom.⁵ It must be observed however, that it is always competent for the parties to create a lien or pledge by their agreement to any extent they choose.⁶

§ 470. It has already been seen that the goods of an ambassador or other public minister, cannot be seized upon execution; nor those of any domestic or domestic servant of such ambassador, except in the cases pointed out.⁷

§ 471. The goods of a certified bankrupt, and of one discharged under the insolvent debtor's act, are protected from levy under a judgment on a debt for which the defendant was discharged by his certificate. But the sheriff is not bound to take notice of such privilege, but should leave the party to apply to the court for relief, for if

¹ 25 Wend. 653, *Peet v. McGraw*; 3 Hill 485, *Grinnell v. Cook*.

² 26 Wend. 467, *McFarland v. Wheeler*.

³ 3 Hill 485, *Grinnell v. Cook*.

⁴ 1 Cow. Tr. 331.

⁵ 3 Hill 485, *Grinnell v. Cook*; 16 Barb. 595, *Bass v. Pierce*.

⁶ 1 Cow. Tr. 330.

⁷ Ante, § 292.

he releases the levy and it should turn out that the discharge was void, he will be liable.¹

§ 472. Goods and chattels, upon which a valid levy has been made, and which has not become dormant by reason of delay, or otherwise discharged, are in the custody of the law, and cannot be levied on by another officer under any other process.²

§ 473. Where the execution is against the owner of the land, "fixtures" cannot be sold on execution against him as personal property. They are a part of the freehold, and must be sold as real estate with it.³

§ 474. "Certain personal property is exempt from levy and sale on execution by statute and at common law. The exemption by statute is said to rest upon a policy looking to the preservation of families against the improvidence or misfortune of their head, and the latter cannot, by a prospective agreement waive such exemption."⁴

§ 475. The Revised Statutes declare that the property hereinafter mentioned cannot be levied on and sold under an execution against the owner when he is a householder. A "householder" is the head, master, or person who has charge of and provides for a family. It has been held that one who rents a house and keeps boarders and servants, is a householder, though he has neither wife nor children for whom he provides.⁵ And where the husband has left the state, leaving a wife and children together, she will be deemed a householder.⁶ But an adult male, residing with his stepmother and transacting her business, will not be deemed such.⁷ Such property is

¹ 21 Wend. 351, *Orange Co. Bank v. Du-bois*.

² Ante, § 449.

³ Ante, § 456.

⁴ Ala.—R. C. § 2773; 37 Ala. N. S. 350, *Cook v. Bain*.

Ark.—Dig. 1858, p. 498; Laws 1867, p. 309; 5 Ark. R. 41.

Cal.—Dig. 1860, p. 195; Laws 1865, p. 271.

Conn.—Rev. 1863, p. 51; 19 Conn. 513, *Atwood v. De Forrest*.

Fa.—Dig. 1847, p. 356.

Ga.—Code p. 401.

Ill.—1 St. 604; Laws 1861, p. 121; 43 Ill. 410, *Churchman v. Stockton*,

46 Ill. 331, *Smother's v. Holley*.

Ind.—2 R. S. p. 356.

Ia.—Rev. 1860, p. 605; 20 Ia 336, *Curtis v. O'Brien*.

Kan.—Gen. St. 1868, p. 473.

Ky.—2 R. S. 753.

Me.—R. S. 532; Laws 1861, p. 6.

Mass.—Laws 1860, Ch. 65; 14 Allen 236, *Woods v. Keyes*.

Mich.—St. 1857, p. 1211.

⁵ 23 N. Y. 249, *Kneetle v. Newcomb*.

⁶ 9 How. 547, *Crawford v. Lockwood*.

⁷ 18 John. 400, *Woodward v. Murray*.

⁸ 19 Wend. 475, *Bowne v. Witt*.

Minn.—Rev. 1866, p. 487.

Miss.—Rev. Code, p. 523; 31 Miss. R. 567, *Whitcomb v. Reid*; Laws 1865, p. 137.

Mo.—Gen. St. 1835, p. 641; 7 Mo. R. 286 *Harrison v. Martin*; 20 Mo. R. 75, *Wade v. Jones*.

Neb.—R. S. 485.

Nev.—St. 1869, 231.

N. J.—Dig. 1855, p. 247; Laws 1860, p. 243.

N. C.—Rev. Code 274.

O.—2 R. S. 1143.

On.—Gen. L. 208.

Penn.—Dig. 1861, p. 429.

Vt.—Gen. St. 1863, p. 362.

Wis.—R. S. 736; 14 Wis. R. 222, *Lowe v. Stringham*; 6 Wis. R. 361, *Ames v. Martin*; 7 Wis. 320, *Gilman v. Williams*; 18 Wis. 163, *Tanner v. Billings*; 19 Wis. R. *Bevitt v. Crandall*.

also exempt while the family of such person, or any of them may be moving from one place of residence to another.¹ And such householder does not lose the character of housekeeper by ceasing temporarily to keep house and storing his property, with a view to retake it again and renew housekeeping.² The articles of personal property thus exempt, when owned by such person, are :

1. All spinning wheels, weaving looms and stoves put up or kept for use in any dwelling house ; also one sewing machine, with the appurtenances thereto belonging ;³

2. The family Bible, family pictures and school books used in the family of such person, and books not exceeding in value fifty dollars, which are kept and used as a part of the family library ;

3. A seat or a pew occupied by such person or his family in a house or place of public worship ;

4. All sheep to the number of ten, with their fleece, and the yarn or cloth manufactured from the same. And such wool and cloth will be exempt though the defendant does not own the sheep from which the wool was sheared.⁴ One cow, two swine, the necessary food for them ; all necessary pork, beef, fish, flour, vegetables procured for family use, (whether gathered or growing,⁵) and necessary fuel for the family for sixty days ;

5. All necessary wearing apparel owned by the householder, or furnished by him for the use of others living with him ; but the exemption does not extend to the clothing of one living in the family who provides them for himself.⁶ Independent of this statute, however, all necessary wearing apparel of the defendant, whether he be a householder or not, is exempt. But if he have two coats, the sheriff may take one.⁷ Beds and bedding for such householder and his family, arms and accoutrements required by law to be kept by such person ; necessary cooking utensils (but to render them exempt it must appear affirmatively that they are necessary and not merely useful.⁸) One table, six chairs, six knives and forks, six plates, six tea cups and saucers, one sugar dish, one milk pot, one tea pot and six spoons, one crane and its appendages, one pair of andirons, and shovel and tongs ;

6. The tools and implements of a mechanic, necessary to carry on

¹ 3 R. S. 613, § 23 ; 18 John. 400, Woodward v. Murray.

² 14 Barb. 456, Griffin v. Sutherland.

³ 4 R. S. 613, § 1.

⁴ 11 Wend. 44, Hall v. Penny ; 21 Wend. 68, Brackett v. Watkins.

⁵ 25 Wend. 370, Carpenter v. Harrington.

⁶ 19 Wend. 475, Bowne v. Witt.

⁷ 19 Wend. 475, Bowne v. Witt ; 2 Cow. Tr. 511 ; Watson 178 ; Sewell 242.

⁸ 14 John. 434, Van Sickler v. Jacobs ; 14 Barb. 456, Griffin v. Sutherland ; 1 Denio 462, Wilson v. Ellis.

his trade, not exceeding in value twenty-five dollars.¹ And it has been held that the exemption extends to a cow kept by the widow of the former owner, who continues to provide for the infant children, though she may marry again.²

§ 476. By the exemption law of 1842,³ as amended in 1859⁴ and in 1866,⁵ it is declared that in addition to the articles then exempt by law from levy and sale under execution, there should be exempt from such levy and sale necessary household furniture, and working tools and team, professional instruments, furniture and library owned by any person being a householder, or having a family for which he provides,⁶ to the value of not exceeding two hundred and fifty dollars. And in addition thereto there shall also be exempt from levy and sale the necessary food for said team for a period not exceeding ninety days, and a sewing machine; provided, that such exemption shall not extend to any execution issued on a demand for the purchase money of such furniture or tools or team or the food for such team or professional instruments, furniture or library or sewing machine or articles now enumerated by law. It has been held that under certain circumstances a watch may come under the designation of tool.⁷ It has been determined that the provisions of this law extend to an execution on a demand contracted previous, as well as to one contracted after the passage of the act.⁸ And also that the exemption by the Revised Statutes and the said act of 1842, are independent; and that property exempt under the former, cannot be taken on execution on a judgment for the purchase price of such property, or of property exempt by said act; but that property exempt by the law of 1842, is liable to be taken on an execution issued upon a judgment recovered on a debt contracted for the purchase of articles exempt by the Revised Statutes or said act.⁹ And that the proviso of said act does not extend to the property of a surety for the purchase price of such exempt property; and that his property, if otherwise exempt, cannot be sold on an execution against him on a judgment obtained against him as surety on a note for the purchase price of exempt property.¹⁰ Where the judgment is for a portion only of the purchase price of exempt property, it has been held that the execution could not be levied on property of the defendant exempt from sale under the statute.¹¹ And also that property exempt by the law of 1842,

¹ 3 R. S. 645, § 22.

² 33 Barb. 596, *Brigham v. Bush*.

³ Laws 1842, Ch. 147.

⁴ Laws 1859, Ch. 134; 4 R. S. 645.

⁵ Laws 1866, Ch. 728.

⁶ 14 Barb. 456, *Griffin v. Sutherland*.

⁷ 17 How. 80, *Bitting v. Vandenburg*.

⁸ 1 Kern. 281, *Morse v. Gould*; 1 Denio

128, *Quackenbush v. Danks*; 1 Com.

129, *Danks v. Quackenbush*.

⁹ 10 Barb. 91, *Davis v. Peabody*; 9 Barb. 676, *Cole v. Stevens*; 6 How. 424, *Cole v. Stevens*.

¹⁰ 10 Barb. 91, *Davis v. Peabody*.

¹¹ 36 Barb. 9, *Hickox v. Fay*.

was liable for the purchase price of property exempt by the same law.¹ The exemption of a necessary team has given rise to a variety of opinions. It is conceded however that the true construction would include the necessary animal or animals, whether horses, mules or oxen the harness, yoke and chains, and the vehicle, whether wagon or cart, to which they are harnessed, necessary to perform the service for which they are used; whether this be the saddle horse, or horse and wagon of a physician, the dray, horse and harness of a cartman, or the pair of horses or oxen of a farmer or teamster.² And it is now held that the term team, includes any team which a householder or head of a family may or can use in and about the business of providing for such family.³ And the debtor need not be the sole owner.⁴ The provisions of the act extend to the property owned by the debtor as a member of a firm.⁵ It has been held that a thrashing machine propelled by horses is not a tool within the meaning of the said law.⁶ And it is declared by statute that the act of 1842 does not apply to any judgment rendered on a claim accruing for work and labor performed in a family as a domestic.⁷ And it has been further declared that no property now exempt by law shall be exempt from levy or sale under an execution issued upon a judgment obtained in any court in the city of New York for work, labor or services done or performed by any female employee when such amount does not exceed the sum of fifteen dollars and exclusive of costs.⁸

§ 477. By the provisions of certain other statutes, the following property is likewise exempt from levy and sale on execution :

1. The shares held by members of building associations, mutual loan and accumulating fund associations to the amount of six hundred dollars, at par value ;⁹

2. Also, all materials procured or partially procured, under a contract with the canal commissioners, shall be exempt from execution ; but it shall be the duty of the canal commissioners to pay the money due for such materials to the judgment creditor of the contractor under whose execution such materials might otherwise have been sold, upon his producing to them due proof that his execution would have so attached, and such payment shall be held a valid payment on the contract ;¹⁰

3. The uniforms, arms and equipments, required by law or regu-

¹ 25 How. 163, *Craft v. Curtis*.

² 5 How. 238, *Wheeler v. Cropsey* ; 6 How. 18, *Morse v. Keyes* ; 8 How. 75, *Eastman v. Caswell* ; 32 Barb. 290, *Davis v. Prosser* ; 29 Barb. 388, *Van Buren v. Loper*.

³ 31 N. Y. 648, *Wilcox v. Hawley* ; 27 Barb. 505, *Lockwood v. Younglove*.

⁴ 25 Barb. 52, *Radcliffe v. Wood*.

⁵ 37 N. Y. 350, *Stewart v. Brown*.

⁶ 34 Barb. 364, *Ford v. Johnson*.

⁷ 3 R. S. 646, § 24.

⁸ Laws 1867, Ch. 516, § 1.

⁹ Laws 1851, Ch. 239.

¹⁰ 1 R. S. 586, § 46.

lation of every officer, noncommissioned officer, musician and private of the national guard shall be exempt from all suits, distresses, executions and sales for debts or for nonpayment of taxes; and every mounted officer, and every member of a troop of cavalry or battery, or artillery, who shall own a suitable horse necessary for his use as such officer or member, shall hold the same with the like exemption ;¹

4. The property of any association formed pursuant to the act authorizing the incorporation of associations to erect monuments to perpetuate the memory of soldiers who fell in defence of the union, passed March 30th, 1866, shall be exempt from levy and sale on execution.²

§ 478. The courts have also determined that all necessary wearing apparel of every debtor is exempt from levy and sale on execution. But if the party have two coats the sheriff may take one. This exception is independant of the statute, and exists at common law.³

§ 479. The exemption of property from sale on execution is a personal privilege, of which the defendant alone can avail himself, and he may, if he chooses, assent to the levy and sale of exempt property ;⁴ though the assent of the wife in the absence of the husband, that the officer may levy, is not binding on him.⁵ It will be no excuse to the officer who seizes property which he knows to be exempt, that the defendant did not designate the particular portion which was not subject to the execution or attachment;⁶ nor can the officer claim in behalf of one creditor an exemption made in favor of another.⁷ But if any part of the judgment was for the sale of intoxicating liquors, any levy and sale of any exempt property, even with the consent of the defendant, shall be void.⁸

§ 480. The property of the wife cannot be seized and sold on execution against the husband, without proof that her title was merely colorable and fraudulent as against the creditors of the husband.⁹

CHAPTER XXVI.

OF SALES UNDER EXECUTIONS. ^a

§ 481. The sale of real estate, or of any personal property, oy virtue of any execution, must be at public vendue;¹⁰ and be conducted by

¹ Military Code, 1870, § 256.

² Laws 1866, Ch. 273, § 6.

³ 19 Wend. 475, *Bowne v. Witt* ; 2 Cow. Tr. 521; *Watson* 178; *Sewell* 242; 38 Barb. 636; *Bumpus v. Maynard*.

⁴ 1 Cow. 114, *Mickles v. Tousley*; 16 Wend. 562, *Earl v. Camp*; 22 Barb. 656, *Smith v. Hill*.

⁵ 18 John. 400, *Woodward v. Murray*.

^a Ark.—Dig. 1858, p. 498.

Conn.—Rev. 1866. p. 52.

⁶ 34 N. Y. 253, *Frost v. Mott*.

⁷ 34 N. Y. 253, *Frost v. Mott*.

⁸ Laws 1842, Ch. 157, § 3.

⁹ 34 N. Y. 293, *Gage v. Dauchy*; 33 N. Y. 518, *Buckley v. Wells*; 4 Keyes 361, *Kluender v. Lynch*; 27 N. Y. 280, *Knapp v. Smith*; 3 Keyes 329, *Van Etten v. Currier*.

¹⁰ 3 R. S. 650, § 50.

Cal.—Dig. 1860, p. 196.

Fa.—Dig. 1847, p. 357.

the sheriff or other officer holding the execution. But an auctioneer may be employed to call off the property. The officer, however, must be present, and conduct and direct the sale, and the property can only be struck off by such auctioneer, to the bidder, with his assent and approval. The sale must be by the officer. Where an auctioneer is employed, which is generally at the instance of parties interested in having the goods bring the highest prices, the expenses thereof must be paid by such parties, as it cannot be charged to the sales. If the officer employs him for his own convenience, he must pay the expense himself, out of his commissions.¹ Where, however, the sheriff of the city and county of New York sells lands under a decree, it is provided that auctioneer's fees may be charged; but they are in such case to be paid by the purchaser of the parcel bought in addition to the amount of his bid.²

§ 482. The sale may be on any day except Sunday, even on the day of election.³ It must be made between the hour of nine o'clock in the morning and the setting of the sun; and if it is made after that hour, it will be void.⁴ If the property cannot all be sold before sun down, the sale of the balance must be postponed until the next day, or until some other convenient time. If such sale is postponed until the next day, it will be sufficient to announce such adjournment at the close of the sale. But if it is postponed to a time beyond the next day, there should be a notice of such postponement posted up in three several places in the city or town where the sale is to take place, as on giving the original notice. If the original notices are standing, it will be sufficient to annex notices of postponement thereto. If it be a sale of real estate, and the sale is postponed beyond the next regular publication day of the newspaper in which the original notice of sale was published, notice of the postponement must also be inserted in such paper, once a week until the day of sale.

¹ Sewell 253.

² Laws 1869, Ch. 569, § 2.

³ 37 N. Y. 155, *King v. Platt*

⁴ 3 R. S. 650, § 50; 14 Barb 9, *Carnrich v. Meyer*.

Ga.—Code, p. 687.

Ill.—1 St. 604.

Ia.—Rev. 1860, p. 606; 16 Ia. 519, *Swortzell v. Martin*.

Ind.—2 R. S. 1852, p. 140.

La.—R. S. 527; Laws 1861, p. 95; Laws 1865, p. 20.

Me.—R. S. p. 532.

Mass.—St. 1860, p. 688.

Mich.—St. 1851, p. 1212.

Minn.—Rev. 1866, p. 1187, 1 Minn. 183,

Tillman v. Jackson; 3 Minn. 227,

Pettingale v. Moss.

Miss.—Rev. Code, p. 528.

Mo.—Gen. St. 1865, p. 639.

Neb.—R. S. 479.

Nev.—St. 1869 p. 233.

N. H.—Gen. St. 1867, p. 443.

N. C.—Rev. Code, 274.

O.—Sup't R. S. 582.

On.—Gen. L. 208.

Tenn.—Code p. 577.

Va.—Laws 1852, 51.

Wis.—R. S. 785.

§ 483. Real and personal property cannot be sold together.¹ And whether it be real or personal property, each parcel should be put up and sold specifically and separately,² or in such lots or parcels as shall be best calculated to bring the highest price.³ But if sold otherwise, the sale, it is said, will not be void, but voidable only;⁴ and a stranger has no right to object that the property was not sold in parcels.⁵ Only so much should be sold as will in the opinion of the officer, bring the amount required.⁶ And if the officer sells more than sufficient, he will be liable to an action by the defendant therefor.

§ 484. No sale of real or personal property can be made under an execution, unless notice of such sale shall have been given for and in the manner pointed out by the statute.⁷ And it is provided by statute that if any person shall take down any notice of a sale of real or personal property, put up by any sheriff, previous to the day of sale therein specified, unless upon satisfaction of the execution by virtue of which notice shall have been given, or upon the consent of the party suing out such execution, and of the defendant therein, such person shall forfeit fifty dollars to the party in whose favor such execution was issued.⁸ And so one has been held liable who carried off a notice which had blown down after it was posted.⁹ But the omission of any sheriff or other officer to give the notice of sale herein required, or the taking down or defacing of any such notice when put up, shall not affect the validity of any sale made to a purchaser in good faith, without notice of any such omission or offence.¹⁰

§ 485. Either party to an action may bid on the sale of any property sold under an execution; and a defendant may purchase on a sale of the property of a codefendant. And so a stockholder may purchase corporate property on a sale thereof by the sheriff for his own benefit.¹¹ Where the plaintiff purchases property so sold, and there is no controversy as to who is entitled to the proceeds of the sale, he is not required to pay his bid unless there is a surplus. In which case he will be bound to pay such surplus.¹² But if there is any dispute between creditors, as to whom the proceeds should go, the sheriff may refuse the plaintiff's bid, unless he will pay the amount of his purchase; or he may refuse to deliver the property to him till paid the

¹ 17 John. 116, *Cresson v. Stout*.

² 14 John. 352, *Sheldon v. Soper*.

³ 3 R. S. 648, § 37; 27 Ind. 450, *Tyler v. Wilkinson*; 30 Ind. 185, *Wright v. Yates*; 30 Ind. 332, *Pell v. Brayer*; 31 Ill. 290, *McLean Co. Bank v. Flagg*; 18 Ia. 74, *White v. Watts*; 11 Mo. 74, *Conway v. Nolte*.

⁴ 17 N. Y. 276, *Cunningham v. Cassidy*.

⁵ 9 Cow. 274, *Stephens v. Baird*.

⁶ 1 John. Ch. 502, *Woods v. Monell*.

⁷ 3 R. S. 645, § 21; *Id.* 650, § 48; *Post*, §§ 489, 495.

⁸ 3 R. S. 650, § 53.

⁹ 44 Barb. 189, *Murphy v. Tripp*.

¹⁰ 3 R. S. 651, § 54.

¹¹ 11 Paige 118, *Mickles v. The Rochester City Bank*; 3 S. & M. (Miss.) 114, *Robinson v. Parker*.

¹² 19 John. 84, *Nicholls v. Ketchum*.

money ; and he may proceed to sell again if he be not paid according to the bid made.¹ Where there is no such controversy, the sheriff may deliver the property purchased by the plaintiff in the execution to him ; and if the judgment is reversed, he will not be liable for the money to the other judgment creditors.² The sheriff may refuse the bid of an infant. And though the property must be sold to the highest bidder, yet if an infant bids and he refuses his bid, and it is sold for a less amount, he will not be liable.³ So it has been held he may refuse to take the bid of an irresponsible person, or of any one, when he is well satisfied that the sale would only be embarrassed by accepting it⁴

§ 486. No sheriff or any other officer to whom any execution shall be directed, or the deputy of such sheriff or officer, holding any execution, and conducting any sale of property, shall directly or indirectly purchase any property whatever, at any sale by virtue of such execution ; and all purchases made by such sheriff, officer, or deputy, or to his use shall be void.⁵ But this prohibition does not apply to a turnkey or jailor who is not a deputy.⁶ And a deputy sheriff who is a plaintiff, or assignee of a judgment, may bid on the sale of the defendant's property when made by the sheriff or another deputy, to save his debt.⁷

§ 487. The same rule prevails upon a sale under legal process, as in other cases of sales at public vendue. Until the property is actually struck off to the bidder, he may withdraw his bid.⁸ But when it is so struck off, the sale is complete, and if the purchaser refuses to take the property and pay the bid, the officer may recover the price of the purchaser, or he may sell the property at once, and recover from him the difference, if any, between his bid and the second sale.⁹ When the plaintiff has bid off goods, the sheriff has no right to allow him to withdraw his bid.

§ 488. The officer has a reasonable discretion in adjourning a sale, and he may do so to another place if necessary, before the sale has commenced.¹⁰ If he cannot get a reasonable price for goods, it is his duty to suspend the sale, and if for this cause he is unable to make

¹ 5 Cow. 390, *Russell v. Gibbs*.

² 19 John. 84, *Nicholls v. Ketchum*.

³ 1 Hill 544, *Kinney v. Showdy*.

⁴ 1 Green's (N. J.) Ch. R. 182, *Merning v. Smith*.

⁵ 3 R. S. 651, § 55 ; 1 Hay. (N. C.) 2 Anon. ; 3 N. H. 144, *Perkins v. Thompson* ; 18 Ill. 145, *Wickliff v. Robinson*.

⁶ 4 Wend. 474, *Jackson ex d. Anderson v. Anderson*.

⁷ 3 Cow. 39, *Jackson ex d. Scofield v. Collins*.

⁸ 23 Penn. 308, *Fisher v. Seltzer*.

⁹ 1 Cow. Tr. 119 ; 2 Cow. Tr. 549 ; 1 H. Black. 81, *Williams v. Millington* ; 11 Minn. 220, *Armstrong v. Vroman* ; 5 S. & M. (Miss.) 508, *Hind v. Grant*.

¹⁰ 5 John. 345, *Tinkom v. Purdy* ; 38 Vt. 209, *Jewett v. Guyer* ; 40 Vt. 576, *Hall v. Ray* ; 11 Me. 371, *Russell v. Richards*.

the money by the return day, and is required by the plaintiff to return the execution, he must return thereto that the goods levied on remain in his hands for want of bidders. And he must still retain possession of the goods, and when he is served with a venditioni exponas, he must sell them at whatever price he can obtain.¹ But he will not be justified in selling upon the execution, greatly under the value of the property. And the sheriff is not, in this respect, bound to obey the direction of the attorney, if he sees that it will produce great sacrifice of property; but he should postpone the sale where the plaintiff cannot sustain any injury by the delay. The officer should take all necessary means to secure the sum directed to be levied, but as to the time, place, and manner of sale he is vested with a sound discretion.²

§ 489. On receiving payment of an execution, or on sale of property on an execution, or upon the redemption of lands sold, the officer may receive current bank bills; and under the ordinary notice of sale, the plaintiff has no right to require that the sheriff shall receive specie only, and if he does so and the officer obeys him, and thereby parties and bidders are put to expense and trouble, or the property brings less than its fair value, it is an abuse in the officer and is censurable.³

§ 490. If the sheriff sells goods without due authority of law, nothing vests in the purchaser.⁴ But a sale by a sheriff of property levied upon, under a junior execution, will be valid.⁵ A sale of real or personal property by the sheriff on execution, only passes such title as the defendant may have therein. If the goods were duly mortgaged by the defendant and he has the right of possession for a definite time, the purchaser acquires such right of possession and the equity of redemption. And it will make no difference whether the sheriff assumes to sell the goods absolutely, or sells them subject to the lien of the mortgage. The manner of sale cannot affect the rights of the mortgagee or of the purchaser.⁶ But if the mortgage is void, and the purchase is made in hostility to it, the purchaser will hold the property absolutely.⁷ If the defendant had no interest in the property sold, the purchaser acquires no title thereto by the sale, for such sale can give him no rights in the lands or goods of a stranger.⁸ Where goods which do not belong to the judgment debtor

¹ Sewell 253; Ante § 428.

² 2 Cow. 139, McDonald v. Neilson; Ante, § 412.

³ 4 Cow. 420, Ex parte Board; 2 Cow. 139, McDonald v. Neilson.

⁴ 7 John. 535, Carter v. Simpson.

⁵ 18 John. 311, Lambert v. Paulding.

⁶ 1 Kern. 501 Hull v. Carnley.

⁷ 28 How. 12, Carpenter v. Simmons.

⁸ 8 John. 406, Catlin v. Jackson, ex d. Gratz; 15 Barb. 568, Hoyt v. Van Alstyne.

are sold by the sheriff on execution, the owner thereof may bring an action against the deputy who made the levy or sale, or the sheriff, or both; or the plaintiff or attorney who authorized or directed the sale, or the purchaser. But the sale of the real estate of a stranger, as it conveys no rights and does not dispossess the owner, it gives no right of action against either the party, the purchaser, or the officer.¹

§ 491. But where the sale of personal property on execution is valid as against the judgment debtor, the purchaser acquires all the rights of such debtor therein.² He has the right to enter upon the premises where sold and to remain long enough to remove them; and if they are growing crops, he may enter upon the land to take care of them, and gather them, and remove them when ripe, whether the land upon which they grew was the defendant's or only leased by him. If the goods were pledged or mortgaged, he acquires the rights of the pledgor or mortgagor therein on his complying with the conditions of such pledge or mortgage; and where a term in goods is sold, the purchaser may use them during the remainder of the term. If the property sold belonged to the defendant with others, as joint tenants or partners, the sheriff may deliver to the purchaser the possession of the whole goods and he holds them as joint tenant with the other partners or owners, subject to account in the case of a partnership with the creditors of the firm. If after goods are seized on execution, the judgment be reversed, or set aside, the party against whom the execution was sued out shall have restitution of the money levied, but not of the goods themselves. But if the judgment be reversed before sale, the goods may be restored to the party.³ When the judgment is set aside for irregularity, restitution where necessary, forms part of the rule and if the goods or money be not restored, the court will of course grant an attachment.⁴ And where a judgment has been obtained against a nonresident defendant by publication, and the defendant afterwards appears and defends, if he is successful and the judgment or any part has been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs: but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.⁵

§ 492. Whether a sale under an execution or a decree is within

¹ 8 John. 406, Catlin v. Jackson ex d. Gratz.

² 16 How. 247, Fuller v. Allen.

³ Watson 191; 7 Cow. 417, Jackson ex d. Bogart v. Schaubert; 1 Wend. 81,

The People ex rel. Gould v. Judges N. Y. Com. Pleas; 5 Wend. 288, Mitchell v. Thorp.

⁴ Watson 192.,

⁵ Code, 135.

the statute of frauds and requires a memorandum in writing to be signed by the purchaser to bind him has never been definitely settled. No statutory provision on the subject is known to exist. The question has frequently arisen in the courts but no general or fixed rule has been determined. In England a master's sale is not considered within the statute.¹ In this country the contrary opinion more generally prevails.² It is the very general practice here to require the purchaser to sign a memorandum of his purchase of real estate.³ But it has been thought that this was not necessary even if the sale was within the statute of fraud; for it is said it would seem that where the statute prescribes the character of the writing which is to be given on the sale that it was intended that such writing was a sufficient compliance with the statute of frauds; and it has been so determined in some of the states, and hence the execution of the sheriff's certificate of sale of real estate or his report of sale under a decree, was all that was necessary.⁴ No certificate of sale is required where personal property is sold, and there is no authority declaring that a sale will bind the purchaser without a writing; and it has in such case been the practice to treat judicial sales of personal property like ordinary auction sales, and to hold the officer's memorandum of the sale, like the auctioneer's, a compliance with the statute; and this practice has been affirmed, and declared sufficient even in the case of a sale of real estate.

CHAPTER XXVII.

SALE OF PERSONAL PROPERTY.

§ 493. A levy having been made upon the personal property of the defendant in the execution, if he will not pay the amount due upon it with the sheriff's fees, it will be the duty of the officer to proceed to sell the property at public auction,⁵ for he cannot deliver over the defendant's goods to the creditor in payment of the execution,⁷ unless it be current gold and silver levied on, which shall be returned as so much collected.⁸ Nor can he pay the execution and retain the goods himself.⁹ The sale may be made before the return

¹ Attorney General v. Day, 1 Ves. 218; 1 Sugden on Vendors, 92.

² 2 Caines 61, Simonds v. Catlin; 2 John 248, Jackson v. Catlin.

³ 1 Barb. Ch. Pr. 528.

⁴ 11 Paige 433, The National Fire Ins. Co. v. Loomis; 11 Minn. 220, Armstrong v. Vroman; 7 Watts & Sergeant, (Penn.), 39 Gaskill v. Morris;

5 Smedes & M. (Miss.) 508, Hand v. Grant

⁵ 23 How. 486, Bicknell v. Byrnes.

⁶ 3 R. S. 645, § 21; Ante, § 481.

⁷ Tidd's Pr. 1052.

⁸ 3 R. S. 645, § 18; 23, Ill. 544, Therpe v. Wheeler.

⁹ Tidd's Pr. 1052.

day, or after it, and even after the sheriff has gone out of office,¹ if a levy was made before the return day, whether the execution be issued from a court of record, or one issued by a county clerk on the transcript of a justice's judgment.² It has been said that the sheriff might sell though no levy was made. But it will be the safer way to follow the universal course and make a levy before attempting to sell.³

§ 494. It has been seen that notice of the sale must first be given.⁴ The statute declares that no sale of any goods or chattels shall be made by virtue of any execution, unless previous notice of such sale shall have been given six days successively, by fastening up written or printed notices thereof, in three public places in the town where such sale is to be had, specifying the time and place where the same is to be had. In computing the time, the day on which the notice is fastened up should be excluded, and a sale on the sixth day thereafter will be valid.⁵ The notice should state whether the sale is by virtue of one or more executions; for if the officer advertise on one, and afterwards another comes to his hands, he cannot sell under it also.⁶ It is usual also and proper to state the court from which the execution issued. The notice should give the name of the defendant at least, and describe generally the goods to be sold, and designate the time of sale, which must be between the hour of nine in the morning and the setting of the sun,⁷ and also the place of sale, which must be within the territorial jurisdiction of the officer. The notice must be signed by the sheriff, or if the sale is to be made by a deputy, he must sign the name of the sheriff, and his own as deputy, as in other cases. The mode of giving notice of the postponement of a sale has already been pointed out.⁸

§ 495. On the sale of personal property, such property must be present and within view of those attending such sale.⁹ If a part of the goods be present, and a part are not, the sale will be valid as to those present.¹⁰ The articles should be pointed out to the bidders, and be sold specifically and separately in such lots and parcels as shall be best calculated to bring the highest price.¹¹ But a stranger has no

¹ 2 Caines 243, *Devoe v. Elliot*; *Sewell* 253; 1 Salk. 323, *Clerk v. Withers*.

² 7 Wend. 388, *Jackson ex d. Cooper Browner*.

³ 29 How. 47, *Bond v. Willett*; But see 33 Miss. 455; 1 Har. (N. J.) 254, *Cook v. Wood*; 1 Gill & J. 37, *Berry*.

⁴ Ante, § 484. [v. Griffith.

⁵ 3 R. S. 645, § 21.

⁶ 3 Cow. 334, *In the matter of Mascraft v. Antwerp*.

⁷ Ante, § 482.

⁸ Ante, § 482.

⁹ 3 R. S. 648, § 37; 17 John. 116, *Cresson v. Stout*; 4 Barb. 484, *Warring v. Loomis*; 15 Ill. 58, *Herod v. Bartley*; 2 Hay. (N. C.) 65, *Blount v. Mitchell*; 4 Ired. (N. C.) 175, *Skinner v. Skinner*; 8 Ired. (N. C.) 492, *McNeely v. Hart*.

¹⁰ 14 John. 222, *Linnendoll v. Doe*.

¹¹ 3 R. S. 648, § 37; 31 Ill. 290, *McLean Co. Bank v. Flagg*.

right to object that the property was not so sold.¹ But where the property is pledged or mortgaged, the sheriff should sell it all together, that the purchaser may be enabled to redeem. And where, in such case, the property was scattered about the farm where the sale was had, and some of it was in view and some was not, but the officer had declared what property was to be sold, and had pointed it out to those in attendance, it was held to be within view, within the meaning of the statute forbidding the sale of personal property on execution, not in view.² The officer is not required to sell goods by retail, though they might bring the highest price, if so sold; but they should be offered in such lots and parcels as will best suit the persons attending the sale. And if as high prices may be obtained by selling the whole in one parcel they may be so sold; and so if they have been offered separately, and no sufficient bid has been made, the officer may sell all together if he can obtain an adequate price therefor. But whatever is sold, must be sold separately, and not collectively without discrimination, or no title will pass. Thus, where an officer sold thirteen sheep of a flock, without designating which, otherwise than by saying the "best and fattest," it was held that the sale was void. And so it has been held that where an officer sells hay in the stack, no title will pass to the purchaser, unless the sheriff separates the part sold at the time.³

§ 496. Where goods are sold upon execution, the sheriff should be careful to have a full and accurate account kept by some competent person, of every article sold, to whom sold, and the price paid, for it is not of unfrequent occurrence that the sheriff is required to give an account of the sales made by him, long after, and to account for the proceeds thereof. Unless he has some means of showing what the levy and sale were, he is at the mercy of either the plaintiff or defendant in the execution, who may think proper to question the correctness of the returns; and such an account would seem to be necessary to complete the sale and bind the purchaser under the statute of frauds. It is not necessary that a bill of sale should be made out to purchasers in all cases, but it is well to do so. And in the case of a sale of stock of a corporation under an attachment against a foreign corporation, nonresident, or absconding or concealed defendant, the sheriff is required to execute a certificate of the sale thereof to the purchaser.⁴

¹ 9 Cow. 274, *Stephens v. Baird*; 28 How. 12, *Carpenter v. Simmons*.

² 4 Denio 171, *Tift v. Barton*; 28 How. 12, *Carpenter v. Simmons*; 6 Hill. 434, *Bakewell v. Ellsworth*.

³ 14 John. 352, *Sheldon v. Soper*; 4 Barb. 484, *Warring v. Loomis*; 11 Barb. 173, *Mason v. White*.

⁴ Ante, § 378, sub. 2.

CHAPTER XXVIII.

OF THE SALE OF REAL ESTATE. ^a

§ 497. If sufficient goods and chattels of the defendant cannot be found in the county, to satisfy the execution in the hands of the sheriff, he must, according to the command of the execution, cause the amount of such execution to be made of the real estate of the person against whom the judgment was rendered, which such person shall have had in the county at the time of docketing such judgment, or at any time afterwards, in whose hands soever the same may be.¹ Or if the execution be issued upon a judgment rendered against any person as *ter-tenant*, heir or devisee, of any deceased person, the sheriff shall, according to the command of such execution, cause the amount thereof to be made of the real estate whereof the ancestor, testator, or person was seized at the time the same real estate became liable, or at any time afterwards, or at the time of the death of such ancestor, testator or other deceased person.² If the suit in which the judgment was recovered was commenced by process of attachment, issuing from a court of record, against a foreign corporation, and real estate was attached by the sheriff, the lien of the judgment dates from the time the lands were so attached.³ Where an appeal has been brought upon a judgment in a court of record, and the clerk has, under the direction of the court, entered in the docket that the same is secured by appeal, the judgment during such appeal shall cease to be a lien upon the defendant's real property, as against purchasers and mortgagees in good faith.⁴ And so where an execution had been returned satisfied, and an entry made in the docket pursuant to the statute, and the return was afterwards vacated by order of the court, it was held that lands sold by the execution debtor to a bona fide purchaser, after entry in the docket, and before the vacature could not be affected by the judgment.⁵ And it is provided that if

¹ R. S. 648, § 38.² 2 R. S. 349, § 39.³ 6 Hill 362, *The Am. Ex. Bank v. The*

Morris Canal & Banking Co.; Ante § 394.

⁴ Code, § 282.⁵ 4 Hill 619, *Taylor v. Ranney*.^a Ala.—R. C. 1867, § 2871.

Ark.—Dig. 1858, p. 498.

Cal.—Dig. 1860, p. 196.

Conn.—Rev. 1836, p. 55.

Ill.—1 St. 602, 606.

Ia.—Rev. 1860, p. 606.

Ky.—1 R. S. 472.

Mass.—St. 1860, p. 516.

Mich.—R. S. p. 317.

Minn.—Rev 1866, p. 487; 11 Minn. 113,

Lockwood v. Bigelow.

Miss.—Rev. Code, 523.

Mo.—Gen. St. 1865, p. 639.

Nev.—St. 1869, p. 234.

O.—2 R. S. 1073.

On.—Gen. Laws, 203.

Tenn.—Code, p. 428.

Vt.—Gen. St. 1863, p. 964.

Wis.—R. S. 783.

any person taken in execution against his body, shall die while so charged, new executions may be issued against the goods, chattels, lands and tenements of the deceased, in the same manner as if he had never been charged in execution. But such new executions shall not be levied upon any real estate which the deceased, after the judgment rendered against him, shall have sold in good faith; nor shall such new executions be levied upon any real estate which shall have been actually sold under any other or prior or subsequent execution against such person.¹ Where a mortgage is given for the purchase money, a judgment older than such mortgage becomes a lien subsequent to such mortgage.² And where one conveys to another, who conveys to a third party, who gives his mortgage to the first, the whole being one transaction, a prior judgment against the second party does not attach.³ Where lands are sold on several executions upon different judgments at the same sale, the executions are to be paid out of the proceeds of sale, not in the order of their delivering to the sheriff, as in the case of a sale of personal property, but in the order of the priorities of the judgments. But if any one of them is older than ten years at the time of the sale, it has ceased to be a lien as to subsequent judgments, and the payment of the execution thereon is postponed until the executions on the judgments less than ten years old on which the sale took place are paid, though the execution was delivered to the sheriff within the ten years.⁴

§ 498. It may be said generally that all the interest of the defendant in real estate, however slight, may be sold on execution against him; even when the title is a bare occupancy, or possession.⁵ A pre-emption right may be taken on execution.⁶ But the interest of one who holds lands under a contract of purchase cannot be sold on execution against such purchaser. But the possession of one who holds under a contract, which does not give the right of possession, may be sold; and if, in such case, the contract is silent as to the possession, the defendant's possession will not be presumed to be under the contract, but will be referred to some other right or contract.⁷ And where one holds by contract and there is a judgment against him and he afterwards performs his contract, the judgment, it has been held will be a lien on the land, though he may have given the title to another.⁸

¹ 3 R. S. 649, §§ 39-44.

² 3 R. S. 39, § 5.

³ 10 Paige 426, *Card v. Bird*.

⁴ 5 Cow. 291, *Roe v. Swart*; 7 Paige 137, *Crosier v. Acer*; 9 Wend. 157, *Little v. Harvey*; 18 Wend. 621, *Tufts v. Tufts*.

⁵ 30 Ill. 84, *Thomas v. Bowman*.

⁶ 44 Ill. 454, *Lester v. White's heirs*.

⁷ 3 R. S. 35, § 4; 6 Hill 525, *Griffin v. Spencer*; 2 Barb. Ch. 453, *Boughton v. The Bank of Orleans*; 10 Paige 562, *Brewster v. Power*; 6 Barb. 116, *Kellogg v. Kellogg*; 3 Paige 219, *Talbot v. Chamberlain*.

⁸ 4 Wend. 462, *Jackson ex d. Ten Eyck v. Walker*.

Where lands are sold on contract a quit claim by the purchaser to another will not authorize a sale on execution against the latter.¹ A judgment against the seller of lands by contract is a lien upon the lands sold, but only to the extent of the unpaid purchase money.² The estate of a tenant by the curtesy initiate may be sold and redeemed as real estate.³ So the estate of a tenant for life or for years may be sold on execution; but not the estate of a tenant at will or by sufferance, which is declared to be a chattel interest and not liable as such to be sold on execution.⁴ Where there is a sale of the interest of a tenant from year to year and the tenancy expires before the expiration of the time to redeem, the purchaser takes nothing.⁵ The interest in land of a cestui que use may be sold on execution.⁶ But the title of a trustee cannot be sold on execution against himself.⁷ A mere equitable title cannot be sold on execution.⁸ A rent reserved, even where there is a right of distress and reentry, cannot be sold on execution.⁹ The interest of the defendant in land mortgaged by him, whether the mortgage has become forfeited or not, may be sold, if he remains in possession.¹⁰ But it is otherwise if the judgment be for the moneys or any part thereof, secured by the mortgage,¹¹ for it is declared that where a judgment shall be recovered for a debt, secured by mortgage of real estate, or for any part of such debt, it shall not be lawful for the sheriff to sell the equity of redemption of the mortgagor, his heirs or assigns in such estate by virtue of any execution upon such judgment. And whenever any execution against the property of the defendant shall be issued upon such judgment, the plaintiff's attorney shall endorse thereon a brief description of the premises mortgaged, referring to the page and book of the record in which such mortgage is recorded, with a direction to the sheriff not to levy such execution upon the said premises, or any part thereof; and if such execution shall not be collected of the other property of

¹ 5 Seld. 49, *Sage v. Cartwright*.

² 17 Barb. 137, *Moyer v. Hinman*; S. C. 3 Kernan 180; 1 O. R. 257, *Manley v. Hunt*.

³ 2 Cow. 439, *Schermerhorn v. Miller*; 2 Binn. (Penn.) 80, *Bard v. Dansdale*; 9 Vt. 326, *Matlocks v. Stearns*. In Maine it has been held that the widows' right of dower cannot be sold on execution, 5 Me. 479, *Nason v. Allen*; and so in Massachusetts, 14 Mass. 378, *Gooch ex'rs v. Adams*.

⁴ 3 R. S. 10, § 5; 2 Barb. 206, *Colvin v. Baker*; 11 Barb. 490, *Lounsbury v. Purdy*; 17 Barb. 394, *Bigelow v. Finch*.

⁵ 17 Barb. 394, *Bigelow v. Finch*.

⁶ 4 Wend. 462, *Jackson ex d. Ten Eyck v. Walker*.

⁷ 11 Barb. 490, *Lounsbury v. Purdy*; 15 Ill. 103, *Baker v. Copenbarger*.

⁸ 1 Oregon R. 43, *Smith v. Ingles*; 23 Miss. R. 55 *Hopkins v. Carey*; *Hardin* (Ky.) 20, *Thomas v. Marshall*; 3 Bibb (Ky.) 363, *Tyree v. Williams*; 2 Bibb 94, *Allen v. Sanders*.

⁹ 4 Denio 405, *Payne v. Beal*; 7 Wend. 463, *The People ex rel. Rosekrans v. Haskins*; 6 Hill 149, *Huntington v. Forkson*.

¹⁰ 1 Caines' Ca. 47; 21 Ill. 53, *Curtis v. Root*.

¹¹ 3 R. S. 649, § 45, 3 Hill 15, *Delaplaine v. Hitchcock*.

the defendant, the sheriff shall return the same unsatisfied, in whole or in part as the case may require.¹ The omission of the attorney to make the indorsement that such property is exempt, will not render a sale thereof valid.² Lands held in trust for one may be sold on execution against him in the cases, and in the manner prescribed in the first chapter of the second part of the Revised Statutes.³ But no such sale can be made unless the defendant has the whole beneficial interest.⁴ Where there is a resulting trust in favor of creditors, the land may be sold on the execution of such creditors.⁵ A contingent remainder or expectancy is not subject to sale on execution;⁶ and land of a defendant in another state, cannot be sold by a sheriff here.⁷ The right of redemption of the debtor is not subject to levy and sale under another execution.⁸ Though lands are held adversely, a sale thereof on execution will be valid. Where land has been sold on execution, but does not bring sufficient to satisfy the judgment and it is redeemed by the defendant or by a grantee, it may be sold again to satisfy the balance, though the return day has passed and the term of office of the sheriff has expired.⁹

§ 499. The following real estate is exempt by statute from sale upon execution: ^a

1. A seat or pew occupied by a householder or his family in any house or place of public worship;¹⁰

2. Land set apart and a portion of which has been actually used for a family or private burying ground, shall not be subject to levy and sale by any execution or other legal process whatever. But such exemption shall not extend to more than one-fourth of an acre of land, nor to any building or erection other than a vault or other place of deposit for the dead; nor unless the owner shall before the sale,

¹ 3 R. S. 649, § 45-47.

² 6 Hill 15, *Delaplaine v. Hitchcock*.

³ 3 R. S. 649, § 40; 3 Barb. 555, *Wright v. Douglass*.

⁴ 3 Paige 478, *The Ontario Bank v. Root*; 17 John. 350, *Bogart v. Perry*.

⁵ 4 Denio 439, *Wait v. Day*; 11 Barb. 399, *Reid v. Fitch*; 10 Paige 562,

Brewster v. Power; 3 Paige 478, *The Ontario Bank v. Root*.

⁶ 52 Barb. 9, *Jackson v. Middleton*; 15 Ill. 103, *Baker v. Copenbarger*.

⁷ 29 Barb. 585, *v. Runk St. John*.

⁸ 24 Ill. 281, *Watson v. Reissig*.

⁹ 5 Hill, 228, *Wood v. Colvin*.

¹⁰ 3 R. S. 645, § 22.

^a Ala.—R. C. 1867, § 2898.

Ark.—Dig. 1858, p. 498.

Cal.—Dig. 1860, p. 195; Laws 1865, p. 392.

Ill.—1 St. 602; Laws 1861, p. 121.

Kan.—Gen. St. 1868, p. 473.

Md.—Laws 1861, Ch. 7.

Mich.—St. 1857, p. 1217.

Minn.—Rev. 1866, p. 496.

Miss.—Rev. Code, p. 529; 33 Miss. R. 462, *Johnson v. Richardson*.

Me.—Gen. St. 1865, p. 639.

Neb.—R. S. 484.

N. H.—Gen. St. 1867 p. 258.

N. C.—Laws 1858, p. 81; Laws 1867, p. 81; Laws 1869, p. 331.

O.—2 R. S. 1145; 1 R. S. 226.

On.—Gen. L. 208.

S. C.—St. 1868, p. 21

Tenn.—Code, p. 428.

Vt.—Gen. St. 1863, p. 455.

Wis.—R. S. 785.

have made, certified and acknowledged in the manner required for the acknowledgment of deeds, a description of said lands, and procured the same to be recorded in the office of the clerk of the county in which said land is situated; and said clerk shall record the same in the proper book for recording deeds, and in the same manner;¹

3. In addition to the property now exempt by law from sale under execution, there shall be exempt by law from sale on execution, for debts contracted after the first day of January, 1851, the lot and buildings thereon, occupied as a residence, and owned by the debtor, being a householder and having a family, to the value of one thousand dollars. Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such homestead until the youngest child becomes twenty-one years of age, and until the death of the widow. And no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such householder, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged. To entitle any property to such exemption, the conveyance of the same shall show that it is designed to be held as a homestead, under the exemption act, or if already purchased, or the conveyance does not show such design, a notice that the same is designed to be so held, shall be executed and acknowledged by the person owning the said property, which shall contain a full description thereof, and shall be recorded in the office of the clerk of the county in which the said property is situated, in a book to be provided for that purpose, and known as the "Homestead Exemption Book." But no property shall be so exempt for a debt contracted for the purchase thereof, or prior to the recording of the aforesaid deed or notice. If, in the opinion of the sheriff holding an execution against such householder, the premises claimed by him or her as exempt, are worth more than one thousand dollars, he shall summon six qualified jurors of his county, who shall upon oath, to be administered to them by such sheriff, appraise said premises, and if in the opinion of the jury, the property may be divided without injury to the interests of the parties, they shall set off so much of said premises, including the dwelling house, as in their opinion, shall be worth one thousand dollars, and the residue of said premises may be advertised and sold by such sheriff. In case the value of the premises shall, in the opinion of the jury, be more than one thousand dollars, and cannot be divided as above provided, they shall make and sign an appraisal of the value thereof,

¹ 3 R. S. 646, §§ 26, 27.

and deliver a copy thereof to the execution debtor, or to some of his family, of suitable age to understand the nature thereof, with a notice thereof attached, that unless the execution debtor shall pay to the sheriff the surplus over and above one thousand dollars, within sixty days thereafter, that such premises will be sold. In case such surplus shall not be paid within said sixty days, it shall be lawful for the sheriff to advertise and sell said premises, and out of the proceeds of such sale, to pay such execution debtor the sum of one thousand dollars, which shall be exempt from execution for one year thereafter, and apply the balance on such execution; but no sale shall be made unless a greater sum than one thousand dollars shall be bid therefor, in which case the sheriff may return the execution for want of property;¹

4. The site and building owned by the New York Historical Society are declared exempt from sale on execution for debts contracted after the passage of the act (not incurred for the erection of the building or the purchase of the premises) so long as such site shall be owned by such society. But to entitle it to such exemption, said society shall execute a declaration of the uses of said property, with a particular description of the same, which shall be recorded in the office of the register of the city and county of New York;²

5. The property of any association formed pursuant to the "act authorizing the incorporation of associations to erect monuments to perpetuate the memory of soldiers who fell in defense of the Union," passed March 30th, 1866, is declared exempt from levy and sale on execution.³

The homestead exemption does not extend to executions in cases of tort or for costs in such cases.⁴ Such exemption is a personal right which the owner cannot convey to another by a deed of the premises as against a judgment creditor of his grantor.⁵ The statute does not exempt the property from being bound and charged by a judgment; but from a sale on execution only so long as the exemption shall continue in force.⁶

§ 500. No levy upon land is necessary under an execution. The judgment itself is the lien, and the execution is but the means of enforcing such lien. Giving notice of the sale required by the statute, under the execution, is sufficient.⁷

§ 501. The time and place of holding any sale of real estate pur-

¹ 3 R. S. 647, §§ 28-33.

² 3 R. S. 648, §§ 34, 35, 36.

³ Laws 1866, Ch. 274, § 6.

⁴ 39 Barb, 396, Lathrop v. Singer.

⁵ 26 Barb. 374, Allen v. Cooke; 36 Barb. 571, Smith v. Brockett.

⁶ 36 Barb. 571, Smith v. Brockett.

⁷ 5 Hill 228, Wood v. Colvin; 34 Me. 463, Fitch v. Tyler.

suant to any execution, shall be publicly advertised, previously, for six weeks successively, as follows :

1. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold, and if such sale be in a town different from that in which the premises to be sold are situated, then such notice shall also be fastened up in three public places of the town in which the premises are situated ;

2. A copy of such notice shall be printed once in each week in a newspaper of such county, if there be one ;

3. If there be no newspaper printed in such county, and the premises to be sold are not occupied by any person against whom the execution is issued, or some person holding the same as tenant or purchaser under such person, then such notice shall be published in the state paper once in each week.¹

It has been held a sufficient compliance with the above requirements if the notices are posted forty-two days previous to the sale and published in six successive numbers of a weekly newspaper, although the first publication may be less than six weeks prior to the sale.²

§ 502. In every such notice, the real estate to be sold shall be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there be any, and if there be none, by some other appropriate description.³

§ 503. When real estate, offered for sale by virtue of any execution, shall consist of several known lots, tracts or parcels, such lots, tracts or parcels shall be separately exposed for sale ; and if any person claiming to be the owner of such real estate, or of such lots, tracts or parcels, or either of them, or claiming to be entitled by law to redeem any such portion, shall require such portion to be exposed for sale separately, it shall be the duty of the sheriff to expose the same for sale accordingly. No more of any real estate shall be exposed for sale than shall appear necessary to satisfy the execution.⁴ If the sheriff sells more than what in the exercise of a sound discretion, will appear sufficient to satisfy the execution, if it can be separated, the sale will be set aside ; and if there is any abuse, the officer will be decreed to pay costs.⁵ The estate and interest of several defendants in a parcel of land held in common should be sold together and not separately, unless some one claiming to be the owner of some portion

¹ 3 R. S. 650, § 48.

² 20 Barb. 148, *Olcott v. Robinson* ; S. C. 21 N. Y. 150.

³ 3 R. S. 650, § 49.

⁴ 3 R. S. 650, § 52 ; 18 John. 355, *Jackson ex d. Vanderlyn v. Newton* ;

2 Cow. 139, *McDonald v. Neilson*

9 Cow. 274, *Stephens v. Baird* ; 6 Wend. 522, *Groff v. Jones* ; 1 John Ch. 502, *Woods v. Monell*.

⁵ 6 John. Ch. 411, *Tiernan v. Wilson*.

of the estate, or claiming to be entitled by law to redeem any portion, shall require such portion to be sold separately, when it shall be so sold.¹

§ 504. Upon the sale of any premises, if they be of leasehold property, where the lessee or assignee of the lease shall not be possessed of at least five years unexpired term of the lease at the time of the sale, there will be no right of redemption, and the sheriff must execute a conveyance thereof to the purchaser.² But if the lands sold are held in any other way, the officer making the sale shall make out and subscribe duplicate certificates of such sale, containing,

1. A particular description of the premises sold ;
2. The price bid for each distinct lot or parcel ;
3. The whole consideration money paid ;
4. And the time when such sale will become absolute, and the purchaser will be entitled to a conveyance pursuant to law.

One of said certificates shall, within ten days after such sale, be filed in the office of the clerk of the county, and the other shall be delivered to the purchaser. If there be two or more purchasers, a certificate shall be delivered to each.³ But the neglect of the sheriff to file the certificate, will not render the sale void. The statute in this respect, is directory merely, and such filing is not a condition precedent.⁴ Where the certificate is irregular, erroneous or defective, the court will on motion, allow the sheriff to amend the same, on his own application, or of any party in interest.⁵ Whenever any such certificate is filed by the sheriff in the office of the clerk or register of any county, it shall be the duty of the clerk or register immediately to record the same in a book to be kept by him for that purpose and the same shall be properly indexed in the name of the defendant or defendants in the judgment ; for which service the clerk or register shall be entitled to the same fees allowed him for recording conveyances, to be paid by the sheriff out of the avails of the sale, except in counties where the clerk or register is a salaried office. And the record thereof, or a certified copy of such record, shall be evidence of the facts therein contained in all courts and places as if the original record was produced.⁶

¹ 5 Barb. 565, *Neilson v. Neilson* ; 27 Ind. 450, *Tyler v. Wilkinson* ; 30 Ind. 185, *Wright v. Yates* ; Id. 332 ; 16 Ind. 165, *Swale v. Champion* ; 17 Ind. 260, *Benton v. Wood* ; 46 Ill. 322, *Martin v. Hargardine* ; 1 Minn. 183, *Tallman v. Jackson* ; 13 Iowa 424 ; 18 Ia. 74, *White v. Watts*.

² 3 R. S. 658, § 95 ; 7 Hill 150, *Ex parte Wilson* ; 17 Wend. 674, *The People*

ex rel. Sears v. Westervelt ; 20 Wend. 416, *Westervelt v. The People ex rel. Sears*.

³ 3 R. S. 651, §§ 56, 57.

⁴ 5 Cow. 269, *Jackson ex d. Hooker v. Young*.

⁵ 1 Cow. 218, *Gansevoort v. Gilliland*.
1 Cow. 430, *Smith v. Hudson*.

⁶ 3 R. S. 651, §§ 58, 59.

§ 505. Any officer who shall sell any real estate, without the previous notices required, or otherwise than in the manner prescribed in the statute, and hereinbefore mentioned, shall forfeit one thousand dollars to the party injured, in addition to any damages which such party may sustain.¹

§ 506. The title will pass in such cases, though the sheriff may be liable to the party aggrieved for any damages he may sustain by reason of any wilful omission or neglect on his part.² Nor will the title of the purchaser be affected by anything that occurs between the parties subsequent to the sale, if he is not a party thereto, or to the judgment.³ Nor does his title depend upon, nor can it be affected by the sheriff's return to the process, whether such return be incorrect, irregular, or insufficient, or whether he make any return or not. It is enough for the purchaser that the officer had authority to sell, and did sell and convey to him.⁴ Nor, as has been seen, is it material whether the sheriff filed the certificate of sale required by statute.⁵

§ 507. When there are surplus moneys arising from the sale of lands on execution, those having liens upon the lands sold, have the same liens upon the surplus moneys which they had upon the lands previous to such sale.⁶ While surplus moneys are in the hands of the sheriff, they are subject to the control of the court, and if another execution comes to the sheriff's hands before the surplus moneys are disposed of, it will direct how to apply them on such execution.⁷ And a junior judgment creditor is entitled to an order of the court for a surplus remaining in the hands of the sheriff on the sale of the debtor's real estate, after satisfying the senior judgment under which the sale was had, and is not confined to the remedy of redemption.⁸ If no such order is made, the sheriff should pay over the surplus moneys to the clerk of the court where the execution is returnable, and leave the parties in interest to apply to the court for the proper distribution thereof.

§ 508. If, as has been seen, the premises sold be held by lease, of which there is not, at the time of the sale, an unexpired term of at least five years, there will be no right of redemption, and the purchaser at the sale will be entitled to a conveyance by the sheriff, and consequently to the immediate possession of the premises sold.⁹ But

¹ 3 R. S. 650, § 51.

² 20 Wend. 622. *Evans v. Parker*; 5 Barb. 565, *Neilson v. Neilson*.

³ 8 John. 281, *Jackson ex d. McCrea v. Bartlett*.

⁴ Cow. & Hill's notes 1094; 1 John. Ch. 502, *Woods v. Monell*; 4 Wheat 506, *Wheaton v. Sexton's Lessees*;

5 Cow. 529, *Jackson ex d. Hill v. Streeter*.

⁵ 5 Cow. 269, *Jackson ex d. Hooker v. Young*.

⁶ 6 Barb. 470, *Averill v. Loucks*.

⁷ 1 Wend. 87, *Van Nest v. Yeomans*.

⁸ 18 Wend. 628, *The People ex rel. Hasbrouck v. Ulster Com. Pleas*.

⁹ Ante, § 504.

if the lessee or his assignee shall be possessed of at least five years unexpired term of the lease at the time of the sale;¹ or if the land is held by the defendant in any other way, his right and title thereto shall not be divested by such sale, until the expiration of fifteen months from the time of such sale.² This however will not prevent the creditor reaching such right of possession by a creditor's bill, or by proceedings supplementary to the execution.³ And it is provided by statute that any person entitled to the possession of lands or tenements sold under execution, may until the expiration of fifteen months from the time of such sale, use and enjoy the same as follows, without being deemed guilty of waste :

1. He may, in all cases, use and enjoy the premises sold, in the like manner and for the like purposes, in and for which they were used and applied, prior to such sale, doing no permanent injury to the freehold ;

2. If the premises sold were buildings, or any other erections, he may make necessary repairs thereto ; but he shall make no alterations in the form or structure thereof ;

3. If the premises sold were land, he may use and improve the same in the ordinary course of husbandry ; but he shall not be entitled to any crops growing thereon, at the expiration of the said fifteen months ;

4. He may apply any wood or timber on such land to the necessary reparation of any fences, buildings or erections, which may have been thereon at the time of sale ;

5. If the land sold is actually occupied by such person, he may take necessary firewood therefrom, for the use of his family.⁴

§ 509. If the person against whose property the execution shall have been issued, or any person who may be in possession of the premises sold, shall at any time after the sale of such premises, and before the time allowed for redeeming the same, do any act of waste thereon, or shall threaten or make preparations to commit waste thereon, the purchaser of such premises or his authorized agent, may apply by petition to any justice of the supreme court, or to the county judge of any county, for an order restraining such wrong doer from the commission of any farther waste on such premises.⁵ If such officer shall be satisfied by due proof that waste has been actually committed by the person against whom the application is made, or that the same has been threatened, or that preparations for committing

¹ 3 R. S. 658, § 95 ; 7 Hill 150, Ex parte Wilson.

² 3 R. S. 655, § 78.

³ 3 Denio 79, Rich v. Baker ; Code, § 292, &c.

⁴ 2 R. S. 623, § 17.

⁵ 3 R. S. 623, § 18.

it have been made by such person, such officer shall grant an order restraining such person from the commission of any waste on the premises so sold.¹ If such person shall, after the service on him of a copy of such order, commit any waste in violation of such order, he shall be liable to be proceeded against and punished in the same manner as for a violation of an injunction to stay waste.² When complaint shall be made of the violation of any such order, the court or officer may order notice to be given to the person complained of, to show cause why he should not be committed, if from the circumstances of the case they shall judge such order expedient.³ And upon satisfactory proof of such violation, such court or officer shall issue a warrant to the sheriff of the county, reciting such order and the proof of the violation thereof, and thereby commanding such sheriff to commit such defendant to close confinement, for such term of time, not more than one year, as shall be deemed expedient,⁴ and the sheriff shall execute such warrant accordingly, and shall commit the person named therein, without allowing him the liberties of the jail.⁵ Such warrant may be superseded, and such person may be discharged by the court or officer committing him, upon receiving a bond, in such penalty and with such sufficient sureties, as such court or officer may approve, to the person applying for the warrant of commitment, conditioned that such prisoner shall not commit any waste on such premises; which bond shall be delivered to such applicant for his use, and to be prosecuted by him for any breach of the condition thereof.⁶

§ 510. Though the defendant in the execution is entitled to the possession, and the rents and profits and lands sold on execution until the expiration of the time for redemption, yet if such premises are not redeemed by the debtor, his heirs or assigns, and a deed is executed in pursuance of the sale, the grantee in such deed, shall be deemed vested with the legal estate from the time of the sale on execution, for the purpose of maintaining an action for waste or any other injury to such real estate, committed on such premises after such sale.⁷

§ 511. At law a judgment is a lien on, and attaches itself to the whole legal estate which the debtor has in the land at the time of the docketing of the judgment whatever that right is. And if it is but for the life of the debtor, the purchaser on sheriff's sale holds in subordination, and not in hostility to the title of the reversioner.⁸

¹ 3 R. S. 623, § 19.

² 3 R. S. 623, § 20.

³ 3 R. S. 623, § 21.

⁴ 3 R. S. 623, § 22.

⁵ 3 R. S. 624, § 24.

⁶ 3 R. S. 624, § 24.

⁷ 3 R. S. 655, § 78; Id. 622, § 15; 5 Paige 65, *Boyd v. Hoyt*; 3 Denio 79, *Rich v. Baker*.

⁸ 3 Seld. 523, *Burlans v. Van Zandt*; 18 John. 94, *Jackson ex d. Stone v. Scott*.

And this lien cannot, without the assent of the creditor, be detached or displaced by any species of alienation, or by any subsequent event whatever. Thus where a judgment is obtained against one before marriage, a purchaser at sheriff's sale under the execution upon such judgment takes the premises free from right of dower of the widow of such judgment debtor, though the premises were sold after the marriage.¹ The effect of the judgment is the same in equity, except that a purchaser under the judgment will take the land subject to any equitable claim thereon, which was prior in point of time to the judgment, and of which the purchaser had notice at or before the sheriff's sale of the property.² Thus he will take the land subject to prior contract for the sale thereof, or subject to an agreement to give a mortgage thereon, or subject to the payment of the purchase money, where the seller retains a lien for the payment of the same.³ Fixtures and growing crops do not pass to the purchaser.⁴ On a sale of lands the sheriff can only deliver the legal possession, and in order to obtain actual possession, where it is refused by the defendant, the purchaser must resort to the statute remedy of summary proceedings to obtain possession of lands,⁵ or to an action of ejectment.

§ 512. But if the judgment be void, or the execution void and not merely voidable, and is subsequently set aside;⁶ or the judgment was entered after the death of the defendant;⁷ or the land was exempt from sale on execution,⁸ the purchaser at sheriff's sale acquires no title. So too, where the judgment has been paid or otherwise satisfied,⁹ or where the sheriff neglects to return an execution, and is fined the amount thereof, and causes another to pay the same and take an assignment for his benefit, a sale of the real estate of the defendant by such sheriff will be void.¹⁰ And so too, if the lands are insufficiently described in the notice of sale, as where they were designated merely as "all the lands and tenements of the defendant and being in the Hardenburgh patent," the sale was held void for uncertainty.¹¹ These are cases where the sale is absolutely void. In others the sale will be set aside, if there is any abuse of the powers of the sheriff in

¹ 3 Paige 117, *Sanford v. McLean*.

² 3 Paige 117, *Sanford v. McLean*; 1 Paige 125, *In the matter of the Petition of Howe*.

³ 1 Paige 125; *Id.* 473, *Sweet v. Green*.

⁴ 33 Penn. 522, *Vaughan v. Halderman*; 20 Penn. 303, *Harlan v. Harlan*; 12 O. R. 88 *Cassidy v. Rhodes*.

⁵ 3 R. S. 836, § 28; 2 O. R. 97, *Beggs v. Thompson*; 13 Wend. 29, *Brown v. Betts*; 17 Wend. 464, *Birdsall v. Phillips*; 20 Wend. 22, *Hallenbeck v. Garner*.

⁶ 1 Cow. 771, *Woodcock v. Bennett*.

⁷ 3 R. S. 638, § 8; 9 Wend. 452, *Nichols v. Chapman*; 10 Wend. 206, *Stymets v. Brooks*.

⁸ 3 Paige 219, *Talbott v. Chamberlain*; 11 Barb. 498, *Bigelow v. Finch*; 6 Hill 225, *Griffin v. Spencer*.

⁹ 5 Hill 272, *Cameron v. Irvin*; 2 Hill 228 *Wood v. Colvin*; 5 Barb. 565, *Neilson v. Neilson*; 1 Cow. 623, *Jackson ex d. Saunders v. Cadwell*; 8 Wend. 676, *Swan v. Saddlemire*.

¹⁰ 1 Kern. 61, *Carpenter v. Stilwell*.

¹¹ 13 John. 97, *Jackson ex d. Carman v. Rosevelt*; 3 R. S. 650, § 49.

making the sale, amounting to a fraud upon any of the parties, as where ten thousand dollars worth of real estate was sold together to satisfy a judgment of one hundred dollars, and the premises were so situated that a portion, which would probably have brought sufficient to satisfy the judgment, could conveniently have been sold separately.¹ And so a sale was set aside, where on an execution for ten dollars and twenty-five cents, the sheriff sold two lots containing four hundred and forty-six acres, a moiety of which belonged to the defendant, and was worth eight hundred dollars, for the sum of thirteen dollars.² And if the sheriff sells together, under the general description of a lot of land of a certain number, which is in truth divided into separate farms, the court will set aside such sale.³

§ 513. As a general rule, a sale of lands to a bona fide purchaser, under an execution upon a judgment against the owner thereof, where such lands are not exempt from sale of execution,⁴ will not be avoided though the judgment be reversed for error.⁵ The revisers of the statutes, however contemplate that a case may occur, where a sale would be avoided by the reversal of the judgment. And hence they have provided for the relief of one who has been evicted from lands purchased by him, by reason of the judgment upon which such execution issued, being revoked or reversed,⁶ in addition to the provision already existing for the relief of one so evicted by reason of any irregularity in the proceeding concerning the sale.⁷ And it is provided by the Code that where a judgment has been taken against an absent defendant, who is subsequently allowed to defend, and where the defence is successful, and the judgment or any part has been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith, shall not be thereby affected.⁸ And so, irregularities in the judgment, or the execution, where they do not render them absolutely void;⁹ or in the sale by the officer, as where the sheriff omits to give the notice of the sale required, or they are torn down;¹⁰ or where the sheriff sells lands before searching for

¹ 6 Wend. 522, Groff v. Jones.

² 6 John. Ch. 411, Tiernan v. Wilson; 4 Cranch 403, Stead's ex'r v. Cowrie; 2 Paige 54, The Mohawk Bank v. Atwater; 1 John. Ch. 502, Woods v. Monell.

18 John. 355, Jackson ex. d. Vanderlyn v. Newton.

⁴ 3 Paige 219, Talbot v. Chamberlain; 11 Barb. 498, Bigelow v. Finch; 6 Hill 525, Griffin v. Spencer.

⁵ 1 Cow. 711, Woodcock v. Bennett; 8 Wend. 9, Wood v. Jackson ex d. Genet.

⁶ 3 R. S. 658, § 68, sub. 2.

⁷ Id. sub. 1.

⁸ Code, § 135; 34 Barb. 144, Kissock v. Grant.

⁹ 1 Cow. 711, Woodcock v. Bennett; 8 Wend 9, Wood v. Jackson, ex d. Genet; 13 John. 97, Jackson ex d. Carman v. Rosevelt; 4 Wend. 462, Jackson ex d. Ten Eyck v. Walker; 1 Cow. 622, Jackson ex d. Saunders v. Cadwell.

¹⁰ 3 R. S. 651, § 54; 1 Lans 405, Wood v. Morehouse.

and selling the goods and chattels of the defendant, will not render a sale to a bona fide purchaser invalid, if the lands are liable to be sold upon such execution.

CHAPTER XXIX.

OF THE REDEMPTION OF LANDS SOLD. ^a

§ 514. The rights of debtors and creditors under the laws of this state, concerning the redemption of lands sold on execution, and the mode of proceeding in such cases, are pointed out in this chapter. And although a failure by a creditor to comply with the requirements of the statute may prejudice the rights of one seeking to redeem, it will be immaterial to the sheriff. His duties in cases of redemption are simple and easily discharged. He is to receive any papers which may be left with him by any person seeking to redeem, and retain them for the inspection and benefit of those interested; and receive and pay over to the person entitled thereto, any moneys which may be paid to him on any redemption; and when any such redemption has been made, he is to give to the party redeeming a proper certificate thereof, and in certain cases he is also to make and file a similar certificate in the office of the county clerk; and when the time for redeeming has expired, to execute a deed to the person entitled thereto of the premises sold. But the sheriff should not assume to decide whether any party seeking to redeem is or is not entitled to do so; nor whether he has or has not complied with the provisions of the statute. These are questions with which he has little to do, and in all such cases he should leave the rights of parties, and all questions touching the regularity of the proceedings, to be settled by those in interest.

§ 515. Within one year from the time when any sale shall have been made, the real estate so sold, or any distinct lot, tract or portion that may have been separately sold, may be redeemed,

1. By the person against whom the execution was issued, and whose right and title were sold in pursuance thereof; or,
2. If any such person be dead, by his devisee of the premises sold, if the same shall have been devised; and if the same shall not have been devised, by the heirs of such person; or,
3. By any grantee of such person who shall have acquired an absolute title by deed, sale under mortgage, or under an execution, or by

^a Cal.—Dig. 1860, p. 197.

Ia.—Rev. 1860, p. 608.

Ill.—1 St. 607; 2 St. 975.

Minn.—R. S. 1866, p. 487.

Nev.—St. 1869, p. 234.

On.—Gen. L. 208.

Tenn.—Code, p 432.

Wis.—R. S. 787.

any other means, to the premises sold, or to any lot, tract, parcel or portion which shall have been separately sold.¹ The trustees of an absconding debtor are entitled to redeem as grantees of such debtor.² One, however, entitled to a sheriff's deed, but which he has not obtained, is not entitled to redeem as a grantee, even though he was prevented from obtaining such deed by injunction at the suit of the judgment debtor.³ A mortgagee or his assignee, however, is not considered a grantee, within the statute. He can only redeem as a creditor of the judgment debtor.⁴ One having an equitable title to the land must redeem within the same time and in the same manner as if he had the legal title, and not as a judgment creditor.⁵

§ 516. Any heir or devisee of the person against whom the execution was issued, and any grantee of such person who shall have acquired an absolute title to a portion of the estate sold, or to a portion of any lot, tract or parcel that shall have been separately sold may redeem the lot, tract or parcel so sold, on the same terms, and in the same manner as if he were grantee of the whole lot, tract or parcel, and shall have the same remedy to enforce contribution from those who shall own the residue of such tract, lot or parcel, as if the sum required to be paid by him to effect such redemption, had been collected by a sale of the portion belonging to such grantee.⁶

§ 517. If there be several persons having undivided shares, as joint tenants, or as tenants in common, in the premises sold, or in any particular lot or tract sold, each person having such title may redeem the share or interest belonging to him.⁷

§ 518. Such redemption by the judgment debtor, his heirs, devisees or grantees, must be made within one year from the time when such sale shall have been made, and not after.⁸ Such redemption is made by the payment to the purchaser at the sheriff's sale, his personal representatives or assignees, or to the officer who made such sale, for the use of such purchaser, of the sum of money which was bid on the sale of the lot or tract sought to be redeemed, together with interest on that sum from the time of sale to the time of payment, at the rate of ten per cent. a year.⁹ If an undivided share or interest is sought to be redeemed, then the party must pay as aforesaid, a sum that will bear the same proportion to the whole purchase money bid for such premises, or for such particular lot or tract, as the share proposed to

¹ 3 R. S. 651, §§ 61, 62.

15 Wend. 248 *Phyfe v. Riley*.

22 Wend. 116, *Lathrop v. Nellis*.

² Post, § 520; 1 Cow. 501, *Van Rensselaer v. Sheriff of Albany Co.*

³ 10 Paige 249, *Russell v. Allen*.

⁴ 3 R. S. 652, § 63; 20 Ill. 313, *Robertson v. Dennis*.

⁵ 3 R. S. 652, § 64.

⁶ Ante, § 515.

⁷ 3 R. S. 651, § 61.

be redeemed, bears to the whole number of shares in such premises or lot or tract, together with interest as aforesaid.¹ The statute does not require that any evidence should be furnished to the sheriff, by the party seeking to redeem, of his right to do so; but it declares that upon the payment aforesaid being made by any person so entitled to redeem any real estate so sold, the sale of the premises so redeemed, and the certificates of such sale shall be null and void.² On making such redemption, neither the judgment debtor nor any heir, devisee or grantee so redeeming, will be entitled to a deed from the sheriff. The effect of a redemption by every such person is merely to render the sale void, and the same lands may, upon any redemption being so made, be resold upon the same judgment, and even upon the same execution, if the same has not been returned, and there remains anything due thereon.³ And the effect is the same, if instead of the debtor redeeming directly, the premises are sold on a former mortgage given by him, and a surplus is realized sufficient to pay the purchaser at the sheriff's sale.⁴

§ 519. Where the redemption is sought to be made by any party entitled thereto, of the officer, the same rules prevail as to whom the money shall be paid, and the character of the money that may be received, as on redemptions by creditors.⁵

§ 520. In case the persons entitled to redeem as hereinbefore mentioned, shall omit to redeem the premises so sold, or any part of thereof, within the year from the sale, then the interest vested in the purchaser by such sale may be acquired within three months after the expiration of such year by any creditor having in his own name, or as assignee, representative, trustee or otherwise, a decree in chancery, or a judgment at law, rendered at any time before the expiration of fifteen months from the time of such sale; or one having a mortgage duly recorded within that period, and which shall be a lien and charge upon the premises sold, or upon any parcel which shall have been separately sold, whether such judgment, decree or mortgage be against the defendant in the execution, or any other person, in the manner hereinafter mentioned; subject to be defeated by any other like creditor in the manner hereinafter pointed out.⁶ If one holds a judgment or decree by an absolute assignment, it will be sufficient to enable him to redeem

¹ 3 R. S. 652, § 64.

² 3 R. S. 652, § 65.

³ 15 Wend. 248, *Phyfe v. Riley*; 44 Barb. 251, *Rankin v. Arndt*; 7 Hill 150, *Ex parte Wilson*; 5 Hill 228, *Wood v. Colvin*; 3 Barb. 70, *Titus v. Lewis*.

⁴ 18 N. Y. 347, *Bodine v. Moore*; 12 Barb. 240, *Stafford v. Williams*.

⁵ Post, § 531.

⁶ 3 R. S. 652, § 67; 4 Hill 542, *Ex parte Wood*; 3 Denio 526, note *a*, *Hodge v. Gallup*; 1 Cow. 443, *Van Rensselaer v. Sheriff of Onondaga Co.*

thereunder, though he paid but little for it.¹ And an assignment of a judgment by an administrator, will be as effectual as if made by the judgment creditor himself, if living.² The county superintendents and overseers of the poor in the several counties of this state, except in the county of New York, shall have the same right to redeem the real estate which may have been seized by them pursuant to the provisions of title one of chapter twenty of part one of the Revised Statutes, as is now possessed by judgment creditors. But no such redemption shall be made by such superintendents and overseers, unless at the time of making such redemption the seizure of the real estate sought to be redeemed shall have been confirmed by the court of sessions of the county where such premises may be situated, nor unless such real estate shall, at the time of making such redemption, be held by the said superintendents or overseers, under and by virtue of the seizure made by them pursuant to the provisions aforesaid.³

§ 521. If such judgment, decree or mortgage, be a lien on any lot, tract or parcel that shall have been separately sold, the creditor having the same may acquire all the rights of the original purchaser, to such lot, tract or parcel, subject to be defeated as hereinafter mentioned. And so if the lien is upon a specific portion only of any lot, tract or parcel so sold, the creditor having the same may acquire the title of the purchaser to the whole of such lot, tract or parcel, in the same manner as if such lien extended to the whole. And if the lien be upon any undivided share or interest in any real estate sold, the creditor may likewise acquire the title of the original purchaser to such share or interest.⁴ But a creditor cannot redeem by virtue of a lien upon a portion of the lands not sufficiently described in the sheriff's advertisement and certificate.⁵ Where a sale is under several judgments, the purchaser takes title under each, and a judgment creditor, in order to redeem, must be entitled to do so in respect to all of them.⁶

§ 522. Whenever any such creditor shall have acquired the title of the original purchaser, pursuant to the foregoing provisions, any other creditor, who might have acquired such title according to the said provisions, may become the purchaser thereof from the first creditor who acquired the same; and in the same manner, any third or other creditor, who might according to the foregoing provisions acquire the

¹ 1 Denio 272, Ex parte Raymond.

² 2 Com. 484, The People ex rel. Post v. Fleming.

³ 4 R. S. 647, §§ 1, 2.

⁴ 3 R. S. 652, §§ 68-70

⁵ 6 Hill 149, Huntington v. Forkson.

⁶ 4 Denio 137, The People ex rel. Post v. Fleming; 2 Com. 484, The People ex rel. Post v. Fleming.

title of the original purchaser, may become the purchaser from any other creditor, upon the same terms and conditions as the second creditor from the first.¹ And a creditor, though he has once redeemed under his judgment and taken title, may redeem again by virtue of the same judgment, for a redemption is not a satisfaction, especially from a sale on a judgment senior to his own and the one from which he first redeemed.²

§ 523. If the original purchaser of any premises so sold, shall also be a creditor of the defendant against whom the execution issued, and as such might acquire the title of any purchaser according to the preceding provisions, he may avail himself of his decree, judgment or mortgage, in the same manner and on the same terms as other creditors, to acquire the title which any creditor may have obtained by a redemption from him.³

§ 524. The plaintiff under whose execution any real estate shall have been sold, shall not be authorized to acquire the title of the original purchaser, or of any creditor to the premises so sold by virtue of the decree or judgment on which such execution issued; and if he have any other decree, judgment or mortgage which would entitle him to acquire such title, according to the preceding provisions he may avail himself of such other decree, judgment or mortgage, in the same manner and on the same terms as any other creditor.⁴

§ 525. One who has sold the premises upon his judgment, whether he purchased them in on the sale himself or not, or whether they were sold for the amount of the judgment or not; or whether any part of the proceeds were applied to his judgment, or the whole was absorbed by prior liens, cannot redeem the premises from such sale by virtue of the same judgment, either from the original purchaser thereof or from a creditor who has redeemed. The sale of the premises under such judgment extinguishes the lien thereof upon such land.⁵ And if the judgment creditor who sells the premises purchases them at a price exceeding his judgment, he cannot redeem them by virtue of such judgment from a sale under an older judgment, for by such sale his judgment became cancelled.⁶ A sheriff's sale and a deed in pursuance thereof, cuts off the lien of all junior judgments and mortgages,

¹ 3 R. S. 653, §§ 71, 72.

² 7 Cow. 540, Ex parte The Peru Iron Company; 8 Paige 285, Van Horn v. McLaren.

³ 3 R. S. 654, § 73.

⁴ 3 R. S. 654, § 74; 4 Denio 137, The People ex rel. Post v. Fleming; 2 Com. 484, The People ex rel. Post v. Fleming.

⁵ 4 Hill 544, Ex parte Paddock; 20

Wend. 602, The People ex rel. Woolley v. Baker; 4 Denio 137, The People ex rel. Post v. Fleming; 2 Com. 484, The People ex rel. Post v. Fleming; 4 Cow. 133, Ex parte Stevens.

⁶ 2 Wend. 297, The People ex rel. Sutliff v. Easton; 5 Hill 228, Wood v. Colvin.

and the holders of such judgments or mortgages cannot redeem upon a subsequent sale under a judgment senior to the one on which the first sale was had.¹ And a mortgage is merged by the foreclosure, and the mortgagee cannot redeem from a sale upon a judgment. Nor is a decree for the deficiency, though docketed, a lien upon the mortgaged premises.² After an available levy upon sufficient personal property belonging to the defendant in the execution to satisfy it, the judgment ceases to be a lien upon the debtor's real estate, and is no foundation for a redemption of the debtor's land sold upon other executions.³ But if the levy is insufficient to satisfy the judgment, the fact that the execution has become dormant in the hands of the sheriff will not affect the lien of the judgment upon the land, nor prevent the creditor redeeming the land when sold under a prior judgment.⁴ So where there is an execution against the body, and the defendant is taken, it is a satisfaction of the judgment while he is so under arrest, and the judgment ceases, for the time, to be a lien upon the defendant's property.⁵

§ 526. A creditor under a senior judgment may redeem from a sale on a junior judgment;⁶ and he may do so whether he hold the judgment on which the sale was made or not.⁷ The judgment under which a redemption is sought to be made, may be obtained after the sale, if before the expiration of the debtor's fifteen months.⁸ It is sufficient that the judgment is a lien upon the premises at the time the party seeks to redeem. It need not be so at the time of the sale. And it may be confessed for the express purpose of allowing one to redeem.⁹ And it will not make any difference that there is a stipulation not to issue an execution under a year.¹⁰ The suffering an execution to become dormant in the hands of the sheriff, does not affect the validity of the lien of the judgment, if the levy is not sufficient to satisfy the execution.¹¹ A judgment more than ten years old, remains a lien as against the defendant in the execution, and the owner of it may redeem as a junior judgment creditor, from a sale against such defendant under a judgment less than ten years old. If

¹ 1 Denio 633, *Ex parte Elwood*; 10 Paige 249, *Russel v. Allen*; 4 Cow. 133, *Ex parte Stevens*; 1 Barb. 379, *The People ex rel. McKnight v. Beebe*.

² 1 Barb. 379, *The People ex rel. McKnight v. Beebe*.

³ 4 Cow. 417, *Ex parte Lawrence*; 6 Wend. 562, *Wood v. Torrey*.

⁴ 7 Barb. 341, *Muir v. Leitch*.

⁵ 1 Cow. 56, *Cooper v. Bigelow*; 13 John 533, *Jackson ex d. Spencer v. Benedict*.

⁶ 7 Cow. 540, *Ex parte The Peru Iron Co.*

⁷ 2 Com. 484, *The People ex rel. Post v. Fleming*.

⁸ 1 Cow. 443, *Van Rensselaer v. Sheriff of Onondaga Co.*; 1 Cow. 501, *Van Rensselaer v. Sheriff of Albany Co.*

⁹ 2 Cow. 518, *Snyder v. Warren*.

¹⁰ 1 Cow. 443, *Van Rensselaer v. Sheriff of Onondaga Co.*

¹¹ 7 Barb. 341, *Muir v. Leitch*.

there be two such judgments, they take priority from the time of the docketing thereof respectively.¹ One holding a judgment rendered by a justice of the peace, and duly docketed with the county clerk, for twenty-five dollars or over, exclusive of costs,² may redeem under it in the same manner as if the judgment was rendered in a court of record, and it will not make any difference that such judgment was rendered in proceedings commenced by attachment.³ And though one redeems and has taken title, it is not a satisfaction, and he may redeem again in virtue of the same judgment, even where the premises to which he acquires title are worth more than the amount paid by him to redeem.⁴

§ 527. In order to redeem from the purchaser, the creditor who may be entitled to do so, shall pay the sum of money which was paid by such purchaser on the sale of such premises, or upon the parcel sought to be redeemed, which shall have been separately sold; and if an undivided share or interest is sought to be redeemed, then he shall pay such part of the whole purchase money as shall be in a just proportion to the amount of such share or interest, together with interest on any such sum at the rate of seven per cent. a year from the time of such sale.⁵ And the whole bid for the part sought to be redeemed, or in such last case, the just proportion of such bid, must be paid without reference to the priority of liens. And if the judgment under which the creditor seeks to redeem is intermediate two judgments on which the lands were sold, and it was sold for enough to pay both such judgments, the creditor holding the intermediate judgment cannot redeem by paying the judgment prior to his own. He must pay the whole bid and interest. Where one holds an intermediate judgment, he should not allow the premises to be sold on an older and junior one at the same time, without having the lands advertised on his own judgment also, else his judgment will become subject to the lien of such junior judgment.⁶ If the purchaser, or the assignee of such purchaser, has also a lien upon the premises by judgment or mortgage, and he shall furnish the sheriff with the proper evidence of such lien, a junior creditor coming in to redeem from the purchaser, must also pay such senior lien as well as the bid and interest.⁷ Where an assignee of the sheriff's certificate holds such prior liens, it is not

¹ 7 Cow. 540, *Ex parte The Peru Iron Company*; 3 Barb. 319, *Scott v. Howard*.

² Code, § 63.

³ 7 Cow. 13, *Jackson ex d. Merritt v. Bowen*.

⁴ 8 Paige 285, *Van Horn v. McLaren*;

7 Cow. 540, *Ex parte The Peru Iron Company*.

⁵ 3 R. S. 652, §§ 67, 70.

⁶ 7 Hill 150, *Ex parte Wilson*.

⁷ 3 R. S. 653, § 71; 2 Hill 51, *The People ex rel. Rice v. Ransom*; 1 Denio 239, *The People ex rel. Newell v. Muzzy*.

necessary in order to entitle him to the payment of them, by any creditor seeking to redeem, that he should formally redeem; it is sufficient that he has the sheriff's certificate, and has furnished to the officer the proper evidence of such liens.¹ And where such assignee presents the sheriff's certificate and assignment to him, in order to entitle him to the payment of such liens, without paying to the sheriff the amount bid, it is not necessary that such assignment should have been first filed with the county clerk.²

§ 528. There is no provision for concurrent redemptions, where judgments are of the same date; but the creditor holding any such judgment who first redeems will be entitled to a deed, unless the other creditor redeems from him; in which case he must pay the amount paid by the former creditor, with interest, and not merely the amount of the bid.³ Where two creditors seek to redeem and neither offers to pay the lien of the other, the creditor having the oldest lien will be entitled to a deed.⁴

§ 529. Whenever any such creditor shall have acquired the title of the original purchaser, any other creditor who might have acquired such title, who seeks to redeem from such first creditor, must,

1. Reimburse to such first creditor his personal representatives or assignees, the sum which may have been paid by him to acquire such title, together with interest thereon at the rate of seven per cent. a year, from the time of such payment, to the time of such reimbursement. If the person seeking to redeem from the first creditor, is also the assignee of the sheriff's certificate, he is not bound to pay the purchase price on the sale. And if such assignee is also a senior creditor, he will be entitled to a deed without paying anything, even though a junior creditor has redeemed;⁵

2. If the judgment or decree by virtue of which the first creditor acquired the title of the original purchaser, be prior to the judgment or decree of such second creditor, then such second creditor shall also pay to such first creditor, the amount due on his judgment or decree.⁶ But if such first creditor is the assignee merely of the lien, by virtue of which he redeemed, he must furnish the officer making the sale, or the second creditor with the evidences of his title to such judgment. Merely claiming it, and giving a memorandum of the amount, is not

¹ 1 Denio 239, *The People ex rel. Newell v. Muzzy*.

² 1 Denio 239, *The People ex rel. Newell v. Muzzy*.

³ 1 Hill 639, *Ex parte Ives*.

⁴ 4 Denio 137; 2 Com. 484, *The People ex rel. Post v. Fleming*.

⁵ 4 Hill 608, *Ex parte Newell*; 2 Hill 51, *The People ex rel. Rice v. Ransom*; 1 Denio 239, *The People ex rel. Newell v. Muzzy*; 1 Cow. 428, *Rosekrans v. Hughson*.

⁶ 3 R. S. 653, § 71, sub. 2.

sufficient.¹ If the lien of the second creditor seeking to redeem, is prior to the lien of the creditor from whom he seeks to redeem, he is not bound to pay such subsequent lien, but only the amount paid by such first creditor on redeeming, and interest;²

3. But if such judgment or decree of the first creditor, at the time of his acquiring the title of the original purchaser, shall have ceased to be a lien as against such second creditor, it shall not be necessary to pay the amount thereof.³

§ 530. The sums required to be paid by the foregoing provisions to acquire the title of the original purchaser, or to become a purchaser from any creditor, may be paid to such purchaser, or if the premises have been redeemed, then to the creditor who last redeemed, or to the representatives or assigns respectively of such purchaser or creditor, or to the officer who made the sale for the use of the purchaser or creditor entitled to the same.⁴ But if the redemption is made on or after the last day of the fifteen months as hereinafter mentioned, the payment must be made to the officer who made the sale, at the sheriff's office, and if he is absent therefrom, then to the sheriff, or in his absence, to the undersheriff or any deputy in the office.⁵ And payment to the county clerk, at the clerk's office, in the absence of the sheriff, undersheriff and deputies, will be void, even if the sheriff has no other office than the clerk's office; and it was held that the defect was not cured by the original purchaser taking the money from the clerk the following day, and using the same to effect a redemption from the first redeeming creditor.⁶ It will not invalidate a payment when properly made, if the redeeming creditor immediately thereafter gives notice to the sheriff not to pay over a part of the money;⁷ nor if he serves an injunction in his own favor restraining the sheriff from paying over the money.⁸ But where a creditor had redeemed upon a prior judgment he was not permitted to recall the payment, although he had a judgment older than the one on which the sale took place, and the premises were not worth more than the bid by the purchaser.⁹

§ 531. Where the redemption is sought to be made of the officer, the money must be paid to the sheriff who made the sale, whether his term of office has expired or not, and not to his successor in office; or

¹ 7 Cow. 540, *Ex parte The Peru Iron Company*; 4 Denio 145, *The People v. Ransom*.

² 1 Cow. 428, *Rosekrans v. Hughson*.

³ 3 R. S. 653, § 71 sub. 3.

⁴ 3 R. S. 654, § 75; 21 Ill. 304, *Stone v. Gardner*; 20 Ill. 313, *Robertson v. Dennis*.

⁵ Post § 539.

⁶ 15 N. Y. 528, *The People v. Rathbun*; 23 Barb. 278, *Griffin v. Chase*.

⁷ 16 N. Y. 567, *Spraker v. Cook*.

⁸ 4 Hill, 608, *Ex parte Newell*.

⁹ 6 Hill 362, *The Am. Ex B'k v. The Morris Canal & Bank'g Co.*

it may be made to the deputy of such sheriff who conducted the sale, unless he has ceased so to be a deputy of such sheriff.¹ And it has been held that a deputy who sells land on execution, has the right to authorize a deposit of the redemption money with another as his agent, and such deposit, within the time allowed by law for redeeming will be a valid payment to the deputy, and constitute a good redemption.² If any sheriff shall die or be removed from office, after having made sale of any real estate, the moneys required to be paid to him for the redemption of such estate, or for the purpose of acquiring the title of the original purchaser, may be paid to his undersheriff, or to the clerk of the county, in the same manner, and with the like effect, as if paid to such sheriff.³ The payment must be in money or equivalent, and a bank check is not such, unless the money be had thereon before the expiration of the time for redeeming.⁴ But the purchaser or person in interest may authorize the taking anything in payment beside money.⁵ And current bank bills may be received by the officer though against the express direction of the purchaser.⁶ Foreign coin received without objection at its current value, but which was in fact worth a few cents less, has been held a valid payment, and this too, though such coin was not a legal tender.⁷

§ 532. The sheriff is not bound to make the computation, but if he does, and miscalculates it so as to mislead the party as to the amount to be paid, the redemption will be good.⁸ But it will be otherwise where the error is made by the party himself; for if an error is committed by him in this respect, and he does not pay all the prior liens and incumbrances that he is bound to pay, the redemption will be void and the payment of the deficiency at the expiration of the fifteen months will not avail him. And the opposite party is not bound to give him any information as to the amount to be paid. All that is required of him is, that if he speaks, he does nothing to deceive or mislead.⁹

§ 533. To¹⁰ entitle any creditor by judgment or decree, to acquire the title of the original purchaser, or to become a purchaser from any other creditor as aforesaid, he shall, in addition to reimbursing to such purchaser or creditor the amount paid as aforesaid, present to and leave with such purchaser or creditor, or the officer who made the sale, the following evidence of his right:

¹ Ante, § 17; 20 Wend. 602, *The People ex rel. Woolley v. Baker*.

² 1 Barb. Ch. 53, *Hall v. Fisher*.

³ 3 R. S. 657, § 90.

⁴ 20 Wend. 602, *The People ex rel. Woolly v. Baker*.

⁵ 2 How. 117, *Stone v. Smith*.

⁶ 4 Cow. 420, *Ex parte C. Board*.

⁷ 4 Hill 613, *Ex parte Becker*.

⁸ 1 Barb. Ch. 53, *Hall v. Fisher*.

⁹ 1 Cow. 481, *Dickinson v. Gilliland*; 1 Denio 272, *Ex parte Raymond*.

¹⁰ 3 R. S. 654, § 76; 3 Barb. 301, *Woolsey v. Saunders*.

1. A copy of the docket of the judgment or decree under which he claims the right to purchase, duly certified by the clerk of the court or of the county in which the same is docketed; or an exemplification of the judgment record.¹ The copy of such docket need not be under the seal of the court; nor need the clerk certify that he has compared it with the original, and that it is a correct copy and the whole thereof. It is sufficient that he terms it a copy.² And a deputy clerk has authority to certify the copy of the docket, and such certificate need not show the absence of the clerk on its face; nor state that the clerk had compared the copy with the original, and that it is a correct transcript thereof, and of the whole of such original;³

2 The original⁴ or a true copy of all the assignments of such judgment or decree, which are necessary to establish his claim, verified by his affidavit, or by the affidavit of some witness to such assignments.⁵ An assignment giving the title of the suit and transferring the judgment to the creditor, but without particularly describing the judgment as to the amount, the term of the court, or the court in which it was recovered, has been held sufficient.⁶ And it has also been held that the omission of the middle letter of the plaintiff's name will not render an assignment void; nor will the omission of the attorney's name; nor if the assignment state the judgment to be for a different sum; nor that it was rendered at a different time, if there is no pretence that there is more than one judgment between the parties. It has also been held that such assignment may be verified by setting it forth and by prefacing or adding that it is a true and accurate copy of the original assignment between the assignee and assignor.⁷ And an affidavit by one that he is the assignee and owner in good faith of the judgment, without any allegation of the execution of the papers has also been held sufficient. But an acknowledgment by an officer authorized to take the acknowledgment of deeds is not a sufficient verification for the purpose of redeeming.⁸ If the assignment is not verified by the party who seeks to redeem, it may be verified by a subscribing witness thereto, if there be one.⁹ But if there is no such subscribing witness, then any one who was present and saw the execution of the assignment, may verify the same. He will be a witness

¹ 1 Cow. 443, *Van Rensselaer v. Sheriff of Onondaga Co.*

² 4 Denio 145, *The People ex rel. Post v. Ransom*; 2 Hill 51, *The People ex rel. Rice v. Ransom.*

³ 4 Com. 554, *Miller v. Lewis.*

⁴ 4 Hill 698, *Ex parte Newell.*

⁵ 10 Barb. 167, *Aylsworth v. Brown*; 1 Denio 662, *Ex parte Aldrich.*

⁶ 4 Denio 137, *The People ex rel. Post v.*

Fleming; 2 Com. 484, *The People ex rel. Post v. Fleming*; 10 Barb. 167, *Aylsworth v. Brown.*

⁷ 10 Barb. 167, *Aylsworth v. Brown.*

⁸ 4 Hill, *Ex parte Newell.*

⁹ 4 Denio 137, *The People ex rel. Post v. Fleming*; 10 Barb. 167, *Aylsworth v. Brown*; 2 Com. 484, *The People ex rel. Post v. Fleming.*

to such assignment within the meaning of the act.¹ The affidavit of one describing himself as an agent, will not be sufficient.² The assignment of the lien may be made by an executor or administrator, and the issuing of letters of administration to him, may be shown by affidavit to be presented with the papers, without producing such letters of administration ;³

3. An affidavit by such creditor, or by his attorney or agent, of the true sum due on such judgment or decree, at the time of claiming such right to purchase. Where the affidavit is made by the agent, it should show that he was the agent, and it should be positive as to the amount due, and if it is on belief merely, it will not be sufficient.⁴ The affidavit should state the true amount due.⁵ An affidavit made five days before it is presented to the sheriff, has been held to be sufficient.⁶

§ 534. To⁷ entitle a creditor by mortgage, his assignee or representative to acquire the title of the original purchaser, or to be substituted as a purchaser from any other creditor, in addition to the payment as aforesaid, he shall present to, and leave with such purchaser or creditor, or the officer who made the sale, the following evidences of his right :

1. A copy of the mortgage under which he claims the right to purchase, duly certified by the clerk of the county where said mortgage is registered or recorded. Such certificate will be good, though it neither bears date nor is under seal ;⁸

2. A copy of the assignment or assignments, where the mortgage has been assigned, verified by his affidavit, or the affidavit of some witness to such assignments ;

3. A copy of the letters of administration, or letters testamentary, where an administrator or executor applies to be substituted as a purchaser ;

4. An affidavit of such mortgage creditor, his assignee or representative, or by his attorney, or agent, stating the true sum due, or to become due on such mortgage at the time of claiming such right to purchase, over and above all payments. An affidavit was held good, though made within a year from the day of sale and consequently

¹ 4 Denio 137, *The People ex rel. Post v. Fleming* ; 2 Com. 484, *The People ex rel. Post v. Fleming*.

1 Denio 662, *Ex parte Aldrich* ; 2 Com. 484, *The People ex rel. Post v. Fleming*.

³ 4 Denio 137, *The People ex rel. Post v. Fleming* ; 2 Com. 484, *The People ex rel. Post v. Fleming*.

⁴ 7 Hill 177, *Ex parte Bank of Monroe* ; 4 Denio 258, *Ex parte Shumway* ; 2 Com. 490, *The People ex rel. Post v. Ransom*.

⁵ 25 N. Y. 619, *Smith v. Miller*.

⁶ 4 Hill 608, *Ex parte Newell*.

⁷ 3 R. S. 654, § 77.

⁸ 2 Hill 51, *The People ex rel. Rice v. Ransom*.

before the party had a right to redeem.¹ The affidavit should state the sum due or to become due on the mortgage positively, and an affidavit stating the sum "due as claimed by this deponent," was held fatally defective.²

§ 535. To entitle superintendents or overseers of the poor to acquire the title of the original purchaser, or to be substituted as purchaser from any other creditor, they shall present to and leave with such purchaser or creditor or the officer who made the sale the following evidences of their right:

1. A copy of the order of the court of sessions, confirming the warrant and seizure of such real estate duly certified to by the clerk of the court of sessions;

2. An affidavit of one of such superintendents or overseers of the poor that the real estate sought to be redeemed is held by such superintendents or overseers, under such warrant and seizure, and that the same have not been discharged, annulled or reversed, but are then in full force. In making the payments the superintendents and overseers have power to use any moneys in their hands belonging to the poor fund of their respective towns or counties.³

§ 536. Such payments and evidences of right to redeem must be made to, and left with the same person or officer, and it will not be sufficient that the money is paid to the party entitled thereto, and that the evidences of title are left with the officer who made the sale. The person or officer with whom such papers are left, should retain the same for the inspection and benefit of all parties interested.⁴

§ 537. The rights of parties become fixed at the expiration of the time for redeeming, and if the creditor seeking to redeem has not furnished all the necessary evidences of his right, or has not paid the full amount that he was required to pay to redeem, through misapprehension, the redemption will be void; the furnishing such papers or the payment of any deficiency after that time will be too late. And it will not make any difference that the opposite party did not give information of the true sum required. They are not obliged to do so.⁵ The party seeking to redeem, must strictly comply with all the conditions, and the officer from whom the redemption is made, has no right to dispense with any of them. But the production of the necessary papers may be waived by the purchaser or creditor, of whom the redemption is made, and such redemption will be valid as against him

¹ 2 Hill 51, *The People ex rel. Rice v. Ransom*; 10 Barb. 167, *Aylsworth v. Brown*.

² 25 N. Y. 619, *Smith v. Miller*.

³ 4 R. S. 647, § 1 &c.

⁴ 4 Denio 145, *The People ex rel. Post Ransom*.

⁵ 1 Denio 272 *Ex parte Raymond*.

but it will be inoperative and unavailing if any other creditor seeks to redeem.¹

§ 538. The right of a judgment creditor to redeem premises sold on a prior judgment cannot be defeated by the purchaser paying, or offering to pay, the judgment under which the creditor claims to redeem without his consent, especially where such payment is not made until after the redeeming creditor has actually paid to the sheriff the amount of the purchaser's bid, and commenced delivering the papers to entitle him to redeem. And a stranger has no right to pay the same for the purpose of extinguishing the lien, and preventing the holder from redeeming. But if the creditor accepts the money, though paid by a stranger, his right to redeem is gone.²

§ 539. Any creditor having a right to redeem, may redeem within twenty-four hours after any preceding redemption, although this will carry it beyond the fifteen months, and no deed upon any sale or redemption shall be executed until after the lapse of twenty-four hours after the last redemption.³

§ 540. All redemptions made on or after the last day of the fifteen months by any creditor, shall be made at the sheriff's office of the county in which the sale took place, and it shall be the duty of the officer making the sale, to attend at said office during the last day for making such redemptions, and during the time thereafter in which such redemptions may be made, and in case of the absence of the officer who made the sale, from the sheriff's office, at such time, then such redemption may be made to the sheriff; and in his absence to the under sheriff, or any deputy present at such office.⁴ And it has been held that where neither the sheriff who made the sale, nor his under-sheriff, nor any deputy could be found in the office on the last day for redemption, and the party went to the sheriff's house and found him then in the building, that the redemption was void. It must be made at the sheriff's office and no where else.⁵

§ 541. When any redemption shall be made prior to the last day of the fifteen months, the officer to whom such redemption shall be made, shall immediately thereafter file in the office of the clerk of the

¹ 4 Denio 145, *The People ex rel. Post v. Ransom*; 7 Hill 91, *Bank of Vergennes v. Warren*; 2 Com. 290, *The People ex rel. Post v. Ransom*; 7 Paige 167, *Waller v. Harris*; 1 Cow. 481, *Dickinson v. Gilliland*; 6 Wend. 526, *The People ex rel. Fleming v. Livingston*; 18 Wend. 598, *The People ex rel. Hammond v. Covell*; 19 Wend. 87 *The People ex rel. Collier*

v. Sheriff of Broome; 20 Wend. 555, *Waller v. Harris*.

² 5 Cow. 248, *Jackson ex d. Lansing v. Law*; 7 Cow. 540, *Ex parte The Peru Iron Co.*; 9 Cow. 641, *Law v. Jackson ex d. Lansing*; 1 Barb. 379, *The People ex rel. McKnight v. Beebe*; 15 Wend. 248, *Phyfe v. Riley*.

³ 3 R. S. 656, § 83.

⁴ 3 R. S. 656, § 82.

⁵ 34 N. Y. 235, *Gilchrist v. Comfort*.

county a statement of such redemption, which shall contain the title of the cause, or if it be a mortgage, the parties to the mortgage, the amount of the judgment, decree or mortgage; the assignee, representatives or trustees thereof, if any, and the amount paid to redeem, the time when such redemption was made, and the sum claimed to be due upon such judgment, decree or mortgage, at the time of such redemption.¹

§ 542. Whenever any redemption shall have been made of any real estate sold, it shall be the duty of the officer making such sale, or of any other person who may lawfully act in his behalf, to execute to the person making such redemption, his certificate, truly stating all such facts transpiring before him at the making of such redemption, as shall be sufficient to show the fact of such redemption. And such certificate may be proved or acknowledged as deeds are required to be, to entitle them to be recorded, and being duly recorded in the clerk's office of the county where the real estate so sold is situated, shall have the same effect as against subsequent purchasers and incumbrances as deeds and conveyances duly proved and recorded; and such certificate or the record thereof, or a duly authenticated copy of such record, shall be received in all courts and places as *prima facie* evidence of the facts therein stated.²

§ 543. A purchaser of lands sold on execution, may make a valid agreement with the execution debtor after the sale, whereby the time of redemption by the debtor is extended beyond the year given by the statute, and a judgment creditor whose judgment is obtained after the sale or agreement, though within the fifteen months, cannot acquire the purchaser's interest under the statute, and a sheriff's deed to him will be void. The purchaser may release his interest altogether, or make any other agreement in good faith respecting it with the debtor, without the consent of the junior judgment creditors, and so as to defeat a redemption by them.³

§ 544. In computing the time of the redemption, the day of sale is to be excluded and full fifteen calendar months from such day are to be allowed.⁴ If the last day is Sunday, the redemption must be made the day before.⁵ On a sale made on the first of January, 1870, the debtor's year for redeeming will expire on the first day of January, 1871, inclusive; and creditors have until, and including the first day of April thereafter to redeem.⁶ And the redemption may be made

¹ 3 R. S. 656, § 82.

² 3 R. S. 656, §§ 84, 85.

³ 4 Com. 554, *Miller v. Lewis*; 10 Barb. 97, *Wright v. Douglass*; 7 Cow. 540, *The Peru Iron Company*; 7 Hill 91, *The Bank of Vergennes v. Warren*.

⁴ 1 Cow. 481, *Dickinson v. Gilliland*; 2 Cow. 518, *Snyder v. Warren*.

⁵ 1 Wend. 42, *The People ex rel. Pugsley v. Luther*.

⁶ 19 Wend. 87, *The People ex rel. Collier v. Sheriff of Broome*.

at any time before twelve o'clock at midnight, of the last day of the fifteen months.¹ And each other creditor entitled to redeem, has twenty-four hours after the last redemption, though it be after the expiration of fifteen months.² The time therefore, when the purchaser will be entitled to a deed if no one redeems, will be the day after the expiration of the fifteen months. Thus, if the sale is on the first day of January, he will be entitled to a deed on the second day of April, in the year thereafter. And such will be the time where a creditor has redeemed before the expiration of the fifteen months. But if he redeemed on that day, no deed can be executed to him until the expiration of twenty-four hours from the time he so redeemed.³

§ 545 After the expiration of the time for redeeming, if any part of the premises sold shall remain unredeemed by the person against whom the execution issued, or by any person entitled to redeem the same within one year from the time of such sale, then the officer making such sale shall complete the same by executing a conveyance of the premises so remaining unredeemed, either to the original purchaser, or to the creditor who may have acquired the title of such original purchaser, or to the creditor who may have purchased such title from any other creditor, as the case may be; which conveyance shall be valid and effectual to convey all the right, title and interest, which was sold by such officer.⁴ If the certificate of such sale has been duly assigned, and such assignment duly acknowledged or proved, as deeds are required by law to be acknowledged or proved to entitle them to be recorded, before some officer authorized to take the acknowledgment and proof of deeds, and filed in the office of the clerk of the county in which the real estate sold is situated, then it shall be the duty of the officer making such sale to execute a deed of the real estate so sold, and remaining unredeemed, to any person or persons to whom such certificate shall have been, or shall be so assigned.⁵ And it has been held that the sheriff may, if he chooses, execute a deed of lands so sold to the assignee of the sheriff's certificate, though the same has not been acknowledged or filed as aforesaid.⁶ In case the person who would be entitled to a conveyance of any real estate sold by virtue of an execution, shall die prior to the delivery of such conveyance, the officer making such sale shall execute and deliver such conveyance to the executors or administrators of the person so deceased.⁷

¹ 7 Hill 177, Ex parte Bank of Monroe.

² 3 R. S. 656, § 83.

³ Id.

⁴ 3 R. S. 657, § 80.

⁵ 3 R. S. 657, §§ 91, 92; 1 Wend. 46, Merritt ads. Hasbrouck.

⁶ 7 Hill 91, The Bank of Vergennes v. Warren; 4 Denio 480, The President &c. of Chautauque Co. Bank v. Risley.

⁷ 3 R. S. 655, § 80.

§ 546. Though the sheriff has actually conveyed the land to a redeeming creditor and who has sold the same to a bona fide purchaser, it will be no answer to a mandamus, to compel him to convey to the one really entitled to the premises.¹

§ 547. Such deed may be executed by the sheriff or the deputy who made the sale, and at any time during the continuance of such sheriff in office, or after the termination thereof, in the same manner as he may complete the execution of process commenced before the expiration of his term of office.² Where a deed is executed by a deputy, it must be executed in the name of the sheriff. But if the deputy who made the sale has resigned, or been removed from office, or otherwise vacated the same, the deed must be executed by the sheriff himself, for a deputy can do no act after the relation has ceased.³ If any sheriff to whom an execution shall be delivered, die or be removed from office before such execution be satisfied, his undersheriff shall proceed thereon, in the same manner as the sheriff might have done; and if the sheriff who has sold any real estate, die or be removed before executing any conveyance in pursuance of such sale, such conveyance shall be executed by his undersheriff in the same manner, and with the like effect, as if done by the sheriff.⁴ If there be no such undersheriff, the court from which the execution issued may, on the application of the plaintiff, appoint some suitable person to proceed on such execution, and complete the same instead of such undersheriff; and on the application of any person entitled to a conveyance, the court may appoint a proper person to execute the same. The person so appointed shall give such security as the court may require, and shall have the same power in relation to the object of his appointment as the sheriff so dying or removed.⁵ Where nothing is to be done by the person so appointed but to execute a conveyance, the court has held that security was unnecessary.⁶

It is further provided by statute that in all cases where any sale of real estate has been or shall hereafter be made under execution, and a certificate thereof given to the purchaser, or his assignee, but no deed executed pursuant to the above provisions of the statute, it shall be the duty of the sheriff making such sale, and in case of his death or removal from office, of his undersheriff, to execute a deed of the estate so sold and remaining unredeemed, to any person or persons

¹ 2 Com. 484, *The People ex rel. Post v. Fleming*; 42 Barb. 418, *Reynolds v. Darling*.

² Ante, § 6; 10 John. 223, *Jackson ex d. Masten v. Bush*; 18 John. 7, *Jackson ex d. Randall v. Davis*; 7 Cow. 739,

Gorham v. Gale; 6 Wend. 213, *Tuttle v. Jackson ex d. Hills*.

³ Ante, § 17.

⁴ 3 R. S. 656, § 88.

⁵ 3 R. S. 657, § 89.

⁶ 10 Wend. 562, *Sickles v. Hogeboom*.

to whom such certificate shall be or shall have been duly assigned, or to any person who shall have duly redeemed the said real estate, other than the execution debtor, or his heirs and assigns, the executors or administrators of any deceased assignee, or of the person who shall have so redeemed the same. In case of the death or other disqualification of both said sheriff and under sheriff before any deed shall be executed, as above provided, it shall be the duty of the deputy sheriff who made the sale, or of any successor in office of said sheriff to execute said deed, and every deed executed pursuant to these provisions shall have the same force and effect as if executed by the sheriff making such sale.¹

§ 548. The deed must bear date after the time for redemption has expired; but the grantee in such deed shall be deemed vested with the legal estate from the time of the sale on such execution, for the purpose of maintaining an action for any injury to such real estate.² The misrecital of a judgment in a sheriff's deed is not material, provided, it appears that in fact the sale was made under a subsisting judgment and execution.³ If in the recital of executions in a sheriff's deed, under which the sale was had, they are described correctly in several particulars, but others are added which are inaccurate, the latter may be rejected as surplusage. The execution need not be set forth nor recited, and if it is recited or described inaccurately, the variance will not affect the deed.⁴ But the lands must be described as fully in the deed as in the notice of sale, or at least sufficiently to identify them.⁵

§ 549. The sheriff's deed conveys only the legal title to the land. Actual possession, where the defendant refuses to deliver it, can only be obtained under the provisions of the statute concerning summary proceedings to obtain possession of land,⁶ or by action of ejectment.

CHAPTER XXX.

SALE OF LANDS UNDER DECREES. ^a

§ 550. Sheriffs may sell any lands in their respective counties, ordered to be sold by any judgment or decree of any court of record

¹ Laws 1867, Ch. 116. § 1.

² 3 R. S. 655, § 78.

³ 5 Cow. 529, Jackson ex. d. Hill v. Streeter; 10 John. 381, Jackson ex d. Martin v. Pratt.

⁴ 9 Cow. 182, Jackson ex d. Witherell v. Jones.

⁵ 13 John. 97, Jackson ex d. Carman v. Rosevelt; 25 Wend. 402, Dygert v. Pletts.

⁶ 3 R. S. 836, § 28, sub. 4; 13 Wend. 29, Brown v. Betts; 17 Wend. 464, Birdsall v. Phillips; 20 Wend. 22, Hallenbeck v. Garner.

^a Ill.—1 St. 144.

Wis.—R. S. 763, 853; Laws 1860, p. 108; Laws 1862, p. 445.

in this state, and give conveyances thereof in the same manner, and with the like effect, as heretofore done by a master in chancery.¹ And it is declared that all sales of real estate hereafter made in the city and county of New York, under the decree or judgment of any court of record, (except sales in cases of partition and where the sheriff of said city and county is a party,) shall be made by the sheriff of said city and county.²

§ 551. Where lands in the city of New York are sold under a decree, order or judgment of any court, they shall be sold at public vendue, at the Merchants' Exchange, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed.³ Where the lands are situate in any other county of this state, they may be sold at any place within such county, and they may be sold at any hour of the day between the hour of nine o'clock in the morning and the setting of the sun.

§ 552. The notice of sale, under a decree of foreclosure of lands lying in any of the cities of this state in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city, for three weeks immediately previous to the time of the sale, at least twice in each week. Where lands in any other part of the state are directed to be sold under a decree of foreclosure, notice of the sale shall be given for the same time and in the same manner as required by law on sales of real estate by the sheriffs, on execution.⁴ Three copies of every such notice must also be affixed in three public places of the town or city where the said premises are to be sold, for the same length of time before such sale, as such notice is required to be published; and if the premises are situate in any other town or city than that in which the sale is appointed to take place, then three similar copies of such notice shall also be affixed for the time aforesaid in the town or city where such premises are situated.

§ 553. The notice of sale ought to contain the title of the action, or at least the name of the first plaintiff and of the first defendant, and if there are other parties it will be sufficient to add "and others."⁵ And it must contain a description of the land directed to be sold. In such cases, the safe mode is to copy the description of the premises from the decree.

§ 554. The manner of proceeding upon the sale is the same as under

¹ 3 R. S. 291, § 49.

² Laws 1869, Ch. 569.

³ Rule 73, Sup. Ct.; 22 How. 358, *Cham-berlain v. Dempsey*.

⁴ Rule 73, Sup. Ct.; Code, § 475.

⁵ 6 Paige 489, *Ray v. Oliver*.

sales upon execution. Where the premises consist of several distinct lots or parcels which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff or other person conducting the sale, to sell the same in separate lots or parcels, unless otherwise specially directed by the court. But if the sheriff or other person is satisfied the property will produce a greater price if sold together, than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.¹ Where mortgaged premises are sold upon a decree of foreclosure and a parcel is sold by the sheriff and bid off by the plaintiff, he is not at liberty to refuse to consummate such sale, or revoke his bid, and direct the sheriff to resell the same parcel with other lands; and if the sheriff, in pursuance of such direction does resell the same, the sale will be set aside as irregular.²

§ 555. If there be a postponement of the sale for any purpose, such postponement shall be made, and notice thereof given in the same manner as on sales of lands on execution. The bare announcement of an adjournment to a future hour in the day, or to the next day, will be sufficient. But if the time is beyond the next day, notices of such postponement should be posted in the same manner as the original notices of sale, and if a regular publication day of the newspaper or newspapers in which the original notice of sale was published, intervenes, notice of such postponement shall be published therein once or twice a week, as the case may require, until such adjourned day.

§ 556. On the sale of mortgaged premises, the sheriff shall, on receiving the amount bid from the purchaser, execute and deliver to such purchaser, a deed of the premises, and he shall dispose of the moneys realized upon such sale in the manner he may be directed in and by such decree. In case of a surplus arising from the sale of mortgage premises, the sheriff or referee shall retain such surplus, subject to the order of the court, unless directions are given in the judgment or decree for the distribution of such surplus. But in the city of New York, the sheriff or referee shall deposit such surplus with the chamberlain of the city, or, when so directed by the court, with the clerk of the court, within five days after such surplus shall have been received, and shall be ascertainable.³

§ 557. On executing and delivering such deed, and on paying over the moneys realized on the sale of mortgaged premises, the sheriff shall then make and file with the clerk of the court in which the

¹ Rule 74, Sup. Ct.; 8 Paige 259, *The American Ins. Co. v. Oakley*.

² 8 How. 117, *Woodruff v. Bush*.

³ Rule 74, Sup. Ct.

decree was rendered, a report of the sale, containing a full statement of the time and manner of sale, and of the execution of the deed in pursuance thereof, and of the disposition of the moneys; and of his doings in other respects under such decree where the same contains any other special provisions; to which report he must annex the receipts of the persons to whom he may have paid any of the moneys under and pursuant to such decree, and of the officer to whom he may have paid any surplus arising on said sale.

§ 558. If the decree of sale is made in a partition case, the notice of sale, whether the premises are situated in a city where there is a daily newspaper or not, must, as in the case of sales on execution, be for six weeks; and a notice for three weeks, where the lands were situated in the city of New York, was held to be irregular, and the sale was declared void.¹

§ 559. On making a sale under a decree in partition, the sheriff should require that a portion of the purchase money should be paid down, say ten per cent. thereof, as security that the purchaser will perform his contract, if the sale is confirmed by the court. If the sale is not confirmed, but a new sale is ordered, the money so paid, must be returned to the purchaser. As soon as the sale is made, the sheriff, before executing any deed to the purchaser is required to make report to the court of his doings under the decree; how and to whom the premises were sold, and the amounts bid, and paid down, and when a deed is to be executed, if the sale is confirmed. Such report must be delivered by him to the plaintiff's attorney, who will present the same to the court, and if the report is confirmed, an order will be made directing a conveyance to the purchaser upon his complying with the terms of the sale. The sheriff must thereupon execute and deliver to the purchaser a proper deed of the premises sold, on receiving the amount of the purchase money; and he shall dispose of the moneys as directed in and by said decree, and take proper vouchers for all payments made by him in pursuance thereof; and after he shall have made such payments he shall make and file with the clerk of the court where the action is brought, a full report of his doings under the decree, and annex such vouchers to such report. It is the duty of the sheriff, or his deputy who makes the sale under a decree to receive and dispose of the proceeds of sale; and if he suffers the attorney to receive the same and it is squandered or lost, he will be liable to the parties in interest for the amount. But it has been held in such case that the statute of limitations will bar summary proceedings to compel the sheriff

¹ 3 R. S. 614, § 69; 5 How. 318, *Romaine v. McMillen*.

to make report and payment over of the money, in a case where the statute would be a bar to an action for the nonpayment of the money.¹

§ 560. On sales of lands under decrees in the city of New York, the sheriff is entitled to receive the amount of fees actually paid by him to any auctioneer, not to exceed however twelve dollars for each parcel separately sold, which are to be paid by the purchaser, in addition to the amount bid by him for the parcel.²

CHAPTER XXXI.

EXECUTIONS AGAINST THE BODY. *a*

§ 561. The writ of *capias ad satisfaciendum* or execution against the body, has already been spoken of, and its form, and the rules applicable to it briefly pointed out in speaking of executions generally.³

§ 562. It is declared by statute that execution shall not issue against the body in those cases in which bail shall have been taken on the arrest of the defendant, and the bail bond shall have been assigned to the plaintiff, and in those cases in which special bail shall have been filed, until an execution against the goods and chattels, lands and tenements of such defendant, shall have been issued to the sheriff of the county in which such defendant was arrested, and shall have been returned unsatisfied in whole or in part. But if the defendant be imprisoned on execution in another cause, or upon process in the same action, or shall have been surrendered in exoneration of his bail in such action, an execution may issue against his body, without any previous execution against his property. Executions either against the body or against the property of any party, may be issued at the same time, to sheriffs of different counties; but no execution against the body of any party shall issue, while there is an execution against his property not returned; nor shall an execution against the property of any party be issued, while there is an execution against his body unreturned, unless by order of the court. And when the body of a party shall have been taken on an execution issued for that purpose, no other execution can be issued against him or his property, except in the cases specially provided by law. But if any person who shall have been taken on an execution shall escape, he may be retaken by a new execution against his body, or an execution against his property

¹ 31 Barb. 439, *Van Tassel v. Van Tassel*.

³ Ante, §§ 407, &c.

² Laws 1869, Ch. 569, § 2.

a Conn.—Rev. 1866, p. 55.
Ind.—2 R. S. 1852, p. 147.
Neb.—R. S. 490.

On.—Gen. Laws 208.
Penn.—Dig. 1861, p. 629.
Vt.—Gen. St. 1863, p. 364.

may be issued, in the same manner as if the body of such prisoner had never been taken in execution.¹

§ 563. Notwithstanding the foregoing provisions of the statute regulating the issuing of executions against the body, it will be the duty of the sheriff to whom any such writ is directed and delivered for execution, to execute the same according to the command thereof, unless the defendant be at the time exempt from arrest;² and it will be immaterial to him whether the plaintiff has the right to issue any such process or not. If the process is not void, it will be his duty to execute it, though it is issued without an execution against the property.³ Nor has the sheriff anything to do with the irregularities in the judgment or process, if they are only such as render it voidable. And if it be not void upon its face, he may execute it if he will, and it will be a protection to him even though it is absolutely void, for reasons which do not appear on its face, whether he was aware of that fact or not. He must be governed and is protected by the process, and he cannot be affected by anything which he has learned out of it, as going to impeach it; or he may, after learning the fact that it is so void, decline to proceed with it, after he has commenced its execution.⁴ But if the process is void upon its face, it will afford the officer no protection, and he should decline to execute it.

§ 564. The time, and places of arrest, the persons who may be arrested, and the manner of making the arrest under the writ, are the same as under mesne process in civil actions, and have been already pointed out, in speaking of the execution of process in civil actions generally.⁵

§ 565. Upon any execution being issued and delivered to the sheriff against the body, in an action where bail has been given, it shall be his duty to use all reasonable endeavors to execute the same, notwithstanding any directions he may receive from the plaintiff or his attorney.⁶

§ 566. When the sheriff shall have arrested the defendant, if he will not pay the execution, it will be his duty to take him forthwith to the proper jail of the county, and commit him to prison. If he does not do so, but allows him to go at large again, or takes him elsewhere than to the county jail, he will be liable for an escape. But it has been held that going with the prisoner, the afternoon on which he was arrested, two miles from the direct road to the jail, to a tavern, on the prisoner's suggestion that the execution might perhaps be

¹ 3 R. S. 642, §§ 2-8.

² Ante, §§ 291, &c.

³ 6 How. 73, *Hutchinson v. Brand*.

⁴ Ante, § 283.

⁵ Ante, §§ 290, &c.

⁶ 3 R. S. 665, § 30.

settled, and then going with the prisoner the same afternoon, one mile further, to the prisoner's house, to enable him to get his clothes and see his wife before he went to jail, was not an escape, but was, under the circumstances but reasonable and proper.¹ If the defendant is ready to give bail for the limits, he need not be actually committed to the jail.

§ 567. Where the defendant has been duly arrested on one process, and is in the custody of the officer thereon, and another writ is placed in the hands of the sheriff against the same party, he is thereby in the custody of the sheriff under both writs, and if the first be settled or the defendant in anywise discharged therefrom, the sheriff must not discharge him out of his custody, but it will be his duty to hold him upon such second writ also, and if he allows him to go at large it will be an escape.² And so the officer must detain him upon such second writ, even if the first arrest was illegal, if such arrest was made without the connivance of the sheriff or the plaintiff in the second execution.³ If however, the prisoner be on the limits at the time of the delivery of the second writ, its delivery to the sheriff is not such an arrest as to place the defendant in custody on the execution.⁴ But what will constitute an escape will be more fully illustrated in the chapter concerning escapes.

§ 568. The sheriff cannot discharge the defendant after arrest, unless the judgment or execution is void, or the party is absolutely exempt from arrest, without payment of the execution. And on making such arrest, he cannot discharge the defendant on receiving security from the defendant, not even a draft.⁵ Nor can he discharge him by direction of the plaintiff's attorney, unless the defendant has actually paid the defendant's debt. But the plaintiff himself may authorize his discharge whether he has paid the debt or not. In such case, however, the sheriff should require the written direction of the plaintiff before he discharges him. If the arrest be in an action for a penalty where one half goes to the informer, such party cannot authorize the release of the defendant, or discharge the judgment, or compound with the defendant without leave of the court, or payment of the judgment. The defendant's discharge in such case so far as relates to the moiety of the penalty belonging to the people is void, and cannot excuse an escape.⁶

§ 569. The attorney of record has no power, as such, to authorize the sheriff to permit the defendant to go at large, after arrest, without

¹ 10 John. 420, *Wool v. Turner*.

² Ante, § 324.

³ *Watson*, 91.

⁴ 8 John. 379, *Tracy v. Whipple*.

⁵ 8 John. 98, *Strong v. Tompkins*; 9 John. 263, *Codwise v. Field*; 13 John. 366, *Wheeler v. Bailey*.

⁶ 11 John. 474, *Minton v. Woodworth*.

payment of the debt, even for the purpose of seeking to obtain the means to pay the execution, and if the sheriff does allow him to go at large it will be a voluntary escape.¹ But the attorney has power, under his general retainer, to acknowledge satisfaction of the judgment at any time within two years after the rendition thereof; and on his executing and delivering such satisfaction piece, the sheriff may release the prisoner unless he has notice that the authority of such attorney has been revoked.² But if the debt has not been actually paid, the defendant will not be discharged from such judgment.³

§ 570. The taking the defendant in execution operates as a satisfaction of the judgment during the time that the party is under arrest.⁴ The plaintiff cannot during this time, issue other process against the defendant's property on such judgment; and during such time it ceases to be a valid judgment for the purposes of redeeming lands of the defendant sold upon another execution.⁵ But the arrest of one of several defendants, is not a discharge of the judgment so as to prevent the arresting or collecting the judgment out of the other defendants. If after arrest the plaintiff discharge the defendant voluntarily, out of custody, it will be a discharge of the judgment, and he cannot afterwards have him arrested on the same judgment, even where the defendant agrees that he may be arrested. And so if the plaintiff consent to the discharge of one of several defendants, he cannot afterwards retake him or any of the others on the same judgment. But if the defendant is discharged from arrest on the ground of irregularity in the execution, or arrest, or because the defendant was temporarily exempt from arrest, a new execution may issue against the body. And so if the defendant escape or be improperly discharged from arrest, new executions may issue against his body or against the property.⁶ And if he is improperly discharged by the sheriff, without the plaintiff's assent, it will be an escape, and he may retake him on the execution or issue a new one, or seek his remedy against the sheriff for such escape. If the defendant be discharged from imprisonment under the statute concerning imprisoned debtors, new executions may be issued against his property, but he cannot be arrested under such judgment;⁷ and if he die in execution, a new execution may issue against his property.⁸ What is an escape, and in what cases the prisoner may be retaken after an escape, and the times and places

¹ 10 John. 230, *Kellogg v. Gilbert*.

² 3 R. S. 640, § 22.

³ 10 Paige 126, *Benedict v. Smith*; 21 Wend. 362, *Simonton v. Barrell*.

⁴ 13 John. 533, *Jackson ex. d. Spencer v. Benedict*; 1 Cow. 56, *Cooper v. Bigelow*

⁵ 1 Ante § 525.

⁶ 3 Com. 331, *Wesson v. Chamberlain*; 3 R. S. 643, § 8.

⁷ 3 R. S. 105, § 12.

⁸ 3 R. S. 649, § 42.

where the arrest may be made by the sheriff, will be pointed out hereafter.¹

CHAPTER XXXII.

WRIT OF POSSESSION.

§ 571. The writ of possession is the process under and by virtue of which the sheriff is authorized and commanded to deliver to the plaintiff, in an action of ejectment, or in an action for dower,² the possession of lands recovered in such action. The form of the writ is prescribed by the Revised Statutes;³ and some of its characteristics have already been pointed out.⁴ Under this writ it is the duty of the sheriff to remove all persons from the premises described in the writ, and of which possession is to be given, and all goods and property that may be thereon, and to put the plaintiff into full and complete possession of the premises. If there be several tenements in possession of several defendants, it is necessary that possession should be given of each; but if there be several tenements in the possession of one defendant, the delivery of possession of one is a good delivery of possession of the whole. The possession given by the sheriff is full and actual possession, and the writ is not fully executed until such possession has been given, and the plaintiff is left in the quiet possession of the premises. The writ may also direct the collection of the costs of the action, under which the duties of the sheriff will be the same as under an execution for the collection of moneys in an ordinary action.⁵

§ 572. The sheriff executes the writ under the direction of the plaintiff or his attorney; and he may first demand an indemnity.⁶ The party or his attorney is bound at his peril to point out the land recovered, and of which possession is to be given; and if the sheriff gives possession of any lands not in the writ, he will be a trespasser.

§ 573. The powers and duties of the sheriff under the writ of possession, are more extensive than in the execution of process generally in civil actions. He may, as in other cases, call to his aid the power of the county in executing the process, if he fears violence, and he may break open all doors necessary to deliver possession, though he should, as in other cases, first signify the cause of his coming, and ask that they may be opened.⁷

¹ Post § 595.

² 3 R. S. 598, § 48.

³ 3 R. S. 595, § 27.

⁴ Ante, § 407.

⁵ 3 R. S. 595, § 27; 3 R. S. 629, § 22.

⁶ Allen 247.

⁷ 5 Coke 92, *Semayne's case*; 4 Cush (Mass.) 302, *Howe v. Butterfield*; 1 Dana (Ky.) 605, *Keith v. Johnson*.

§ 574. If the officer be disturbed in the execution of the writ, the court will, upon affidavit, grant an attachment against the person disturbing him, whether he be the defendant or a stranger, even if it be after the execution of the writ is completed; as where the officer leaves the plaintiff in possession, and the defendant presently ejects him from such possession, the court will grant an attachment against the defendant.

§ 575. Where the writ is not made returnable, as it seldom is, the sheriff may under it remove the defendant or one claiming under him, from the premises as often as he intrudes upon them. But if a stranger so intrudes, that is, one claiming not under the defendant, but by and under a different title, the sheriff cannot remove him from the premises under such writ.¹ In such case the plaintiff must resort to other proceedings to obtain possession of the land. Where there is any doubt as to how or by what claim of right a person intrudes upon land, the sheriff cannot be compelled, without the direction of the court to remove such person, and in all such cases of doubt, the officer should before removing the party require that the plaintiff first apply to the court on notice to such person, for an order directing the sheriff to remove him. If such order is made, it will be a protection to the sheriff. If the writ has been returned to the proper office, the duties of the sheriff thereunder are at an end, unless the court, direct his return to be stricken out, and the writ returned to him to be farther executed.

CHAPTER XXXIII.

IMPRISONMENT IN CIVIL ACTION.

§ 576. It is the duty of the sheriff as keeper of the jails of his county to safely keep all prisoners committed to him under civil process for the time and in the manner provided by law.² When a prisoner is brought to the jail for commitment, upon civil process, the jailer before receiving him should ascertain that the officer has authority to make the arrest, and that it is his duty to receive the prisoner. And if the warrant or execution upon which he is arrested does not require the officer executing it, to return the same to the court or officer issuing it, the jailer should require such process to be left with him for his authority and protection, after the officer has made a due indorsement of the arrest thereon. If such process must be returned to the court or officer issuing it, then the jailer should require such

¹ 11 Wend. 182, *Jackson ex d. Miller v. Hawley*. ² Ante, Ch. 13.

officer to leave with him a true copy of such execution, with all the indorsements thereon, with his return, and the whole duly certified by such officer. And in either case, there should likewise be indorsed a statement of the fees of such officer, upon executing such writ, that the jailer may know what to receive in case the execution is paid. The jailer should make an entry of the time of commitment of the prisoner, and under what process; when let to bail upon the limits, and when discharged. But it is not necessary to make all the entries he is required to do in the case of one committed on criminal process.

§ 577. When a prisoner shall be committed to the jail of the county upon civil process, the sheriff or jailer thereof shall not suffer such prisoner to go without the prison, except upon his giving bail for the limits in the cases where he may be let to bail; or in pursuance of the command of a writ of habeas corpus duly granted, or order of the court; upon the necessary removal of such prisoner to another jail, in the cases where he may be so removed; upon payment of the judgment or debt for which he is committed, or on the cancelment of the judgment of record, or by the direction of the plaintiff, which direction ought to be in writing, (the direction of the attorney for the plaintiff will not be sufficient, as he has no power to discharge the prisoner without actual payment of the debt;) on the discharge of the defendant by a proper court; or, when he is committed upon a justice's judgment, at the expiration of the time for which he shall remain committed, on his making the proper affidavit, to entitle him to his discharge as hereinafter mentioned. If such sheriff or jailer shall suffer any person so committed on civil process, to go or be at large beyond the liberties of the jail, except in the cases mentioned, he will be liable for an escape. And so they will be liable for an escape, if he goes beyond the liberties without leave, unless he shall return within such liberties before suit is brought. When one is committed to the debtor's prison in the city of New York, under an execution against the body for the nonpayment of a judgment not exceeding fifteen dollars exclusive of costs recovered by a female employee, he shall in pursuance of the directions of the execution be confined in the prison without benefit of the jail limits until he shall pay the said judgment or be discharged according to law; but such imprisonment shall in no case extend beyond the period of five days.¹

§ 578. Prisoners arrested on civil process, shall be kept in rooms separate and distinct from those in which prisoners detained on criminal charge or conviction, shall be confined; and on no pretence

¹ Laws 1867, Ch. 516, § 2.

whatever, shall prisoners on civil and criminal process, be put or kept in the same room. Male and female prisoners, unless they be husband and wife, shall not be put, kept or confined in the same room in any prison.¹

§ 579. Whenever any person shall be arrested by virtue of an execution, issued upon any judgment rendered in a court of record, or surrendered in exoneration of his bail, or upon any other process in a civil action, whether issuing from a court of record or not, he shall be safely kept in secure custody, in the manner prescribed by law, at his own expense, until he shall satisfy such execution, or be discharged according to law.² If any person be arrested and kept in any house other than the jail of the county, neither the officer arresting him, nor the person in whose custody such person may be, shall demand or receive from such prisoner, any other or greater sum for lodging, drink, victuals, or other necessary things than shall have been prescribed by the court of sessions of the county; or if no rate shall have been prescribed by such court, such officer or person shall not receive any other or greater sum than shall be allowed by a justice of the peace of the same town, upon proof that the lodgings or other things furnished, were so furnished at the request of the prisoner. And in no case shall such officer or person demand or receive any pay or compensation for any spirituous liquors, sold or delivered to such prisoner.³ A prisoner so kept in any house, may send for and have any beer, ale, cider, victuals and other necessary food, and such bedding, linen and other necessary things, as such prisoner shall think fit, where and from whom he pleases without any detaining or paying for the same, or any part thereof, to the officer arresting him, or to the person in whose custody such prisoner may be.⁴ And no sheriff, jailer or other officer, shall demand or receive any money or valuable thing whatsoever, for the chamber rent of any prison, or any fees, compensation or reward, for the commitment, detaining in custody, release or discharge of any prisoner, other than such fees as are allowed by law.⁵ In King's county it is declared that the sheriff of the county shall not confine in the county jail of said county any person or persons arrested upon process in civil actions until the plaintiff, upon whose

¹ 3 R. S. 725, §§ 8, 10. But see 1 O. R. 119, *Campbell v. Hampson*, where it is held that the sheriff is not liable for confining criminals, and those held on civil process in the same room when there is but one room in the jail.

² 3 R. S. 659, §§ 105, 106. In *McLain v. Hayne*, 3 Brev. (S. C.) 291, it was declared that the sheriff is not bound

at the Common Law to maintain his prisoner confined on civil process; but he was held liable to the plaintiff where he suffered a prisoner to go at large because he was destitute and the plaintiff had refused to pay for his maintenance.

³ 3 R. S. 724, § 3.

⁴ 3 R. S. 724, § 4.

⁵ 3 R. S. 724, § 5.

application the arrest is made, shall pay to the sheriff for the use of the said county and to apply on expense of board of such prisoner, the sum of twenty-five dollars, and a like sum shall be paid to said sheriff for the like purpose every twenty days that said debtor is so confined after the lapse of the first twenty days after the arrest is made ; and said sheriff shall account to the county for all moneys so received.¹

§ 580. Any sheriff or other officer, who shall offend against any of the preceding provisions, concerning the manner of confining prisoners, and charging or receiving pay from prisoners other than is prescribed by law, shall forfeit to the party aggrieved, three times the damages found by the jury ; and shall be liable to an indictment for a misdemeanor, and upon conviction thereof, in addition to any other punishment, shall forfeit his office or place.²

§ 581. It shall be the duty of the sheriff of the several cities and counties of this state, to receive into their respective jails, and keep all prisoners who shall be committed to the same, by virtue of any civil process, issued by any court of record, instituted under the authority of the United States of America, until they shall be discharged by the due course of the laws of the United States, in the same manner as if such prisoners had been committed by virtue of process in civil actions issued under the authority of this state ; and every such sheriff may receive to his own use, such sums of money as shall be payable by the United States, for the use of the said jails ; and every such sheriff or keeper to whose jail any prisoner shall be committed, by any marshal or other officer of the United States, shall be answerable for the safe keeping of such prisoner, in the courts of the United States according to the laws thereof.³

§ 582. Where the court shall order the discharge of a prisoner, upon his discharge under the insolvent laws of this state, the sheriff shall discharge him on being served with such order, without any detention on account of any fees,⁴ and the assignees of such debtor shall pay such fees out of the proceeds of the assigned property.⁵

§ 583. If a prisoner committed on a justice's execution, or on an execution issued by the county clerk upon a transcript of such judgment, has a family in this state for which he provides, and he be not

¹ Laws 1869, Ch. 813, § 1. The statute does not declare what the sheriff shall do with the prisoner in case the plaintiff refuses or neglects to make the payment. It simply provides that he shall not confine him in the county jail. Will this authorize the sheriff to discharge him ; or

must he safely keep him elsewhere, if he will not give bail for the liberties of the jail ?

² 2 R. S. 725, § 11.

³ 3 R. S. 743, §§ 121, 122.

⁴ 3 R. S. 107, § 11.

⁵ 3 R. S. 107, § 15, sub. 1.

a freeholder, he shall be discharged from jail after he shall have remained in prison thirty days; and if he have no family, and be not a freeholder, he shall be discharged, after remaining in prison sixty days; on his delivering to the sheriff or jailer, an affidavit, taken before some officer authorized to take affidavits, stating the title of the action in which he was committed, and the officer who issued the execution; the time of commitment, and that he has remained in jail, or upon the limits, from the time of such commitment, until the time of making such affidavit; that he was not at the time of such commitment and is not a freeholder, and that he has at the time of making such affidavit, a family in this state, mentioning the place therein, for which he provides, or that he has no family for which he provides. If it appears from such affidavit that the prisoner has such family, and has remained in jail or on the liberties for full thirty days, or if he has not such family, for sixty days, the sheriff or jailer shall discharge him and file the affidavit with the county clerk, who shall file the same without fee or reward; and a refusal to discharge the defendant on his tendering such affidavit, subjects the officer to a penalty of twenty-five dollars for every day he shall detain such prisoner, to be recovered, with costs, by the party aggrieved, to his own use in addition to any damages he may recover for the false imprisonment.¹ The sheriff is bound to discharge the defendant from prison, on receiving such affidavit, without inquiry into the truth thereof, and whether the prisoner be on the limits or in jail.² And such affidavit, or a copy thereof, duly certified by the clerk of the county, under the seal of the court of common pleas, may be given in evidence in any action against him for such discharge, and the same will be a justification and defence. In computing the time, the day of commitment is to be excluded, and full thirty, or sixty days, as the case may require, must have expired before he can be discharged. Thus, if the commitment was made on the twenty-fifth of August, he cannot be discharged until the twenty-sixth of September, in the first case, and in the other, until the twenty-sixth of November.³ If the defendant is a freeholder, he must remain in prison until the debt is paid.⁴

§ 584. When any defendant, at the time judgment shall be rendered against him, in any court of record, shall be in the custody of a sheriff or other officer, either upon process in the suit in which such judgment shall have been rendered, or upon being surrendered in discharge of his bail in such suit, the plaintiff in such judgment shall charge such defendant in execution thereon, within three months after the last

¹ 3 R. S. 449, §§ 135-140.

² 11 John. 174, *Lohnis v. Jones*.

³ 10 Barb. 117, *Judd v. Fulton*.

⁴ 2 Cow. Tr. 556.

day of the term next following that at which such judgment shall have been obtained. And where any defendant shall be in custody upon a surrender in discharge of his bail, made after a judgment obtained against him, and such bail shall be thereupon exonerated, the plaintiff in such judgment shall charge such defendant in execution thereon, within three months after such surrender, or if an execution against the property of such defendant shall have been issued, within three months after the return day of such execution. If any plaintiff shall neglect so to charge the defendant in execution as aforesaid, such defendant may be discharged from custody by a supersedeas to be allowed by any judge of the court in which such judgment shall have been obtained, unless good cause to the contrary be shown; and after being so discharged such defendant shall not be liable to be arrested upon any execution which shall be issued upon such judgment.¹

§ 585. Whenever any person shall have remained charged in execution for the space of thirty days from the date of his imprisonment, any creditor at whose suit he shall have remained charged, may by a written notice, require the sheriff of the county in which such person shall be so imprisoned to discharge him from imprisonment; and thereupon such prisoner shall be discharged from imprisonment so far as he is held under such execution, and thereafter such creditor may have the same civil remedies to enforce payment of the judgment upon which such execution was issued as if such execution had not been issued and such person so discharged had not been charged in execution at the suit of such creditor. But no further execution against the body of such person shall be issued on such judgment.²

CHAPTER XXXIV.

LIBERTIES OF THE JAIL.

§ 586. Every person who shall be in the custody of the sheriff of any county, by virtue,

1. Of any *capias ad respondendum*, or judge's order; or,
2. Of any execution in a civil action; or,
3. By virtue of any attachment for the nonpayment of costs in a civil action; or,
4. In consequence of a surrender, in exoneration of his bail;

Shall be entitled to be admitted to the liberties of the jail which shall have been established in such county, according to law, upon executing a bond to such sheriff and his assigns, as hereinafter mentioned.³

¹ 3 R. S. 870, §§ 38, 39.

² 3 R. S. 108, § 17.

³ 3 R. S. 733, § 61; 4 Paige 282, *The People ex rel. Hawley v. Bennett* Id. 397, *Patrick v. Warner*.

§ 587. The following persons, when in custody, are not entitled to the liberties of the jail :

1. The father¹ and mother of a bastard ;²
2. One committed for waste ;³
3. When the defendant is committed on a judgment for trespass on state lands ;⁴
4. One committed for the nonpayment of a penalty under the statute relative to excise, and the regulation of taverns and groceries, or under the statute relating to fisheries ;⁵
5. One committed for the nonpayment of a penalty under the laws relative to the manufacture of salt ;⁶
6. One committed upon any process issued by any officer or court, including courts martial, for contempt or misconduct in the cases prescribed by law ;⁷
7. One committed to jail under the provisions of the nonimprisonment act ; and under the provisions of the Code, concerning proceedings supplementary to the execution ;
8. One on the limits who escapes, is not entitled to them again on recapture.⁸

§ 588. A prisoner entitled to the liberties of the jail, shall first execute a bond by himself and one or more sufficient sureties, being inhabitants and householders of the county, in a penalty which shall be as follows :

1. It shall not be less than double the amount of the sum in which the sheriff was required to hold the defendant to bail, if he be in custody on mesne process, or be surrendered in exoneration of his bail before judgment docketed against him ;
2. It shall be not less than double the amount directed to be levied by the execution or attachment, if he be in custody upon attachment or execution ;
3. It shall not be less than double the amount for which the judgment shall have been rendered against him, if he be surrendered after judgment docketed.⁹

As the sheriff is primarily liable for the escape of the defendant, it is important that he should see that the sureties to the bond are not only good at the time, but such as will be able to respond to him in any damages he may thereafter sustain, by reason of the escape of the

¹ 2 R. S. 909, § 17.

² 2 R. S. 910, § 20 ; Id. 913, § 36.

³ 3 R. S. 624, § 23.

⁴ 1 R. S. 554, § 94.

⁵ 3 R. S. 447, § 126.

⁶ 1 R. S. 681, §§ 244, 245.

⁷ 3 R. S. 736, § 82 ; 4 Paige 282, *The People ex rel. Hawley v. Bennett*, Id. 397, *Patrick v. Warner*.

⁸ Allen, 214.

⁹ 3 R. S. 733, § 62.

defendant. The sheriff has the right to insist upon the most ample security, before he allows the defendant the liberties of the jail.

§ 589. Such bond shall be conditioned that the person so in custody of such sheriff, shall remain a true and faithful prisoner, and shall not, at any time, or in any manner, escape or go without the limits and boundaries of the liberties established for the jail of such county, until discharged by due course of law.¹ The condition of the bond must conform substantially to the terms of the act, or it will be void. Thus, where there was a condition to the bond that the defendant should at the request of the sheriff surrender himself to the prison, it was held void.² And so where the sheriff, in addition to the bond, took a warrant of attorney to confess judgment, on which a judgment was entered and execution issued, the court ordered them set aside, as the warrant was void.³ Every such bond when in due form, taken for the liberties of any jail, shall be valid and shall be held for the indemnity of the sheriff taking the same, and of the party at whose suit the prisoner executing such bond, shall be confined.⁴

§ 590. If a sheriff who shall have taken any such bond for the liberties of any jail, shall discover that any surety to such bond is insufficient, he may commit the prisoner who executed the same, to close confinement in such jail, until other good and sufficient sureties shall be found. And the sureties in any such bond may surrender their principal at any time before judgment shall be rendered against them on such bond; but such bail shall not be exonerated thereby from any liability incurred before the making such surrender. Such surrender may be made as follows: the bail may take the principal to the keeper of the jail, and upon the written requirement of such bail, the keeper shall take such principal into his custody, and thereupon indorse upon the bond given for the limits, an acknowledgment of the surrender of such principal; and such keeper shall also, if required, give the bail a certificate acknowledging such surrender.⁵ But the bail are not entitled to have the bond returned to them on such surrender, after suit brought on such bond.⁶

§ 591. The keeper of every jail to whom a certified copy of the minutes of the county court, establishing the liberties of such jail shall be delivered, shall keep the same exposed to public view, in some open and public part of such jail; and it shall be the duty of such jailer to exhibit the same to every person who shall be admitted to the liberties of such jail, at the time of executing the bond for the liberties.⁷ But

¹ 3 R. S. 733, § 63.

² 19 John. 233, *Sullivan v. Alexander*.

³ 1 John. Ca. 129, *Dole v. Moulten*.

⁴ 3 R. S. 733, § 64.

⁵ 3 R. S. 733, §§ 64-67.

⁶ 1 Sandf. 684, *Betts v. Livermore*.

⁷ 3 R. S. 732, § 60.

the sheriff is not bound to ascertain the liberties of the jail; he is only required to let the prisoner on execution, go at large within the limits established. It is the duty of the prisoner to keep in places clearly defined and within the limits.¹

§ 592. The liberties of the jail are considered merely an extension of the prison walls, and the going at large of any prisoner who shall have executed such bond, or of any prisoner who would be entitled to the liberties of any jail upon executing such bond, within the limits of the liberties of the jail of the county in which he shall be in custody, shall not be deemed an escape of such prisoner; but in case any such prisoner shall go at large without the liberties of such county, without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape, and forfeiture of the bond so executed; and the sheriff in whose custody such prisoner shall have been, shall have the same authority to pursue and retake such prisoner, as if such escape had been made from the jail. And the retaking the prisoner, and his giving a new bond, does not take away the sheriff's right of action against the sureties upon the first bond, in consequence of his having been sued for an escape. But it is a good defence to a suit upon the bond, that the prisoner was retaken, or voluntarily returned before suit.²

§ 593. The sheriff may allow the prisoner the limits without bond, at his own risk, if he will, and if the prisoner escapes, his right of recaption remains in full force; and a voluntary return within the limits of the jail before suit brought is equivalent to a recaption, and a defence to an action for an escape³. The liberties of the jail being considered merely an extension of the walls of the jail, and a return within the limits before suit brought, is the same as a return within the jail.⁴

§ 594. When the jail of one county is designated for the use of any other county, and any prisoners have been admitted to the liberties previous to such designation, they shall, notwithstanding such designation, be entitled to remain within such liberties; and prisoners coming to the custody of the sheriff of such latter county, after such designation, may be admitted to the liberties of such jail, as if no such designation had taken place; but all such prisoners may be removed to the jail so designated, and confined therein by the sheriff to whom they have given bonds, in the same cases and in the same manner as such sheriff might by law confine them in the jail of his own county.

¹ 7 John. 163, *Kip v. Brigham*.

² 3 R. S. 734, §§ 68, 69.

³ 6 John. 121, *Peters v. Henry*.

⁴ 10 John. 549, *Jansen v. Hilton*; *Allen*, 214.

And prisoners confined in the jail so designated, or removed there, who are entitled to the liberties of the jail, shall be admitted to them by the sheriff of the county where such jail is, in the same manner, and in the same cases, as if they had been originally arrested by such sheriff, on process directed to him. When the designation is revoked, it shall be the duty of the sheriff to remove the prisoners belonging to his custody, to his proper jail, including prisoners who may have been admitted to the liberties in such other county, and who shall be admitted to the liberties of the jail to which they shall be removed.¹

CHAPTER XXXV.

ESCAPES. ^a

§ 595. An escape is where one who is under lawful arrest, evades such arrest and restraint, either violently or privily, or is suffered to go at large by the officer having him in custody, even for the shortest time, before delivery by due course of law.² Escapes from custody under civil process are divided into voluntary escapes and negligent escapes. An escape is voluntary when it is with the assent of the officer having the prisoner in custody; and it is negligent when such escape is without the knowledge or assent of such officer, whether it be from the officer on the arrest, from the jail, or from the liberties thereof.³ The distinction between a voluntary and negligent escape is important, as will be seen in respect to the liability and rights of the sheriff suffering such escape, in civil matters, but the distinction does not prevail in criminal cases.⁴

§ 596. It has already been seen that any sheriff, jailer, coroner, marshal, or constable, who shall corruptly and wilfully omit to execute process by which any prisoner on criminal process shall escape; or shall wilfully suffer any offender lawfully committed to his custody to escape or go at large; or shall receive any gratuity or reward, or any security or engagement for the same, to procure, assist, connive at, or permit any prisoner in his custody on any civil process, or on any criminal charge or conviction to escape, whether such escape be attempted, or affected or not, shall, on conviction, be punished by

¹ 3 R. S. 726, §§ 18, 19, 20.

² 9 John. 329, *Palmer v. Hatch*; *Sewell* 440; 1 Cow. 300, *Jones v. Cook*.

³ 10 John. 549, *Jansen v. Hilton*; 4

John. 45, *Tillman v. Lansing*; *Sewell*, 441.

⁴ 6 Hill 344, *Clark v. Cleveland*.

^a Ill.—1 St. 340, 392.

Ky.—1 R. S. 457.

Mich.—St. 1867, p. 180, 1453, 1533.

Minn.—Rev. 1866, p. 614.

Miss.—Rev. Code, p. 124, 535, 539.

Neb.—R. S. 615.

On.—Gen. Laws 390.

Va.—Code, 735.

imprisonment in a county jail, not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment. And in addition thereto, such officer shall, on conviction, forfeit his office, and shall forever be disqualified to hold any office or place of trust, honor or profit, under the laws or constitution of this state.¹

§ 597. There is a material distinction between the liability of the sheriff in the case of an escape of one confined on a criminal charge, and one who is in custody upon civil process. In the former case, he is only liable to the foregoing penalties in case of corrupt and willful misconduct on his part, and not for the acts or defaults of his deputies or jailers, however criminal their conduct may be, unless they acted under his direction. And if he suffers one so committed to go at large through the want of due caution, unless such want of caution amounts to gross neglect of duty; or where he permits one to go at large under a misapprehension of the law of facts; or where he suffers him to be discharged on bail by an officer who has no right to let to bail in the particular case, he will be excused. But in all such cases it will be the duty of the sheriff to retake such prisoner whenever he can find him, and recommit him to the jail from whence he escaped or was suffered to go at large. When the prisoner is confined upon civil process, however the sheriff is not only subject to the foregoing penalties in case of wilfully and corruptly allowing the prisoner to escape, but he is also liable to an action at the suit of the party aggrieved, whether the escape was with his assent, or without his knowledge; or whether the escape was from his own custody, or that of his deputy or his jailer. What will constitute an escape in a civil case, and what not, and the rights and liability of the sheriff in such case, will be more distinctly pointed out in the following pages.

§ 598. All prisoners committed to any jail upon process for contempt, or committed for misconduct in the cases prescribed by law, shall be actually confined and detained within such jail, until they shall be from thence discharged by due course of law, or shall be removed to some other jail or place of confinement, in the cases provided by law; and if any sheriff or keeper of a jail shall permit or suffer any prisoner so committed to such jail, to go or be at large out of his prison, except by virtue of some writ of habeas corpus, or rule of court, or in such other cases as may be provided by law, he shall be liable to the party aggrieved, for his damages sustained thereby,

¹ Ante, § 11; 3 R. S. 965, §§ 20, 21; Id. 737, §§ 86, 87.

and shall be deemed guilty of a misdemeanor.¹ And in the case of an insolvent debtor, where one refuses to answer all lawful questions put to him, or shall refuse to sign the examination, and is committed therefor, any sheriff or jailer wilfully suffering any person so committed, to escape, shall be liable to an indictment for a misdemeanor, and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.² Where one is committed for contempt, it is an escape, if instead of confining him in the jail, the sheriff suffers him to occupy or remain in any other part of the building than that in which the prisoners are confined; as where he allows the party so committed to occupy the jailer's sitting room.³

§ 599. If any prisoner committed to any jail, by virtue of any *capias ad respondendum*, or other mesne process, or upon surrender in exoneration of his bail, made either before or after judgment rendered, shall go or be at large without the limits and boundaries of the liberties of such jail, without the assent of the party at whose suit such prisoner shall have been committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party, in an action of trespass on the case, to the extent of the damages sustained by him.⁴ But the party can recover no more in such action than he has lost by the escape, and for this purpose the sheriff may show the pecuniary character of the prisoner, and if he was worth nothing, the party will not be entitled to recover anything.⁵

§ 600. If any prisoner, committed to any jail, in execution in a civil action, including actions for penalties, shall go or be at large without the boundaries of the liberties of such jail, without the assent of the party at whose suit such prisoner was committed, (and the assent of his attorney will not be sufficient, unless the debt has been actually paid,⁶) the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail, shall be answerable to such party for the debt, damages or sum of money for which such prisoner was committed, to be recovered by an action of debt.⁷ And it has been held that the sheriff was liable for an escape where there was no jail; but that in such case he had a remedy over against the

¹ Ante, § 256; 3 R. S. 736, § 82.

² Ante, § 252; 3 R. S. 117, §§ 14-18.

³ 10 Paige 606, *The People ex rel. Backus v. Stone*; Ante, § 256.

⁴ 3 R. S. 736, § 83.

⁵ 1 John. 215, *Potter v. Lansing*; 7 John.

165, *Stewart v. Kip*; 2 John. Ca. 205, *Dole v. Moulton*; 17 Wend. 543, *Patterson v. Westervelt*.

⁶ 6 John. 51, *Crary v. Turner*; 10 John. 220, *Kellogg v. Gilbert*.

⁷ 3 R. S. 736, § 84.

county.¹ It has also been held that incapacity of the jail was no defence.²

§ 601. Arresting one and leaving him in the custody of another, not an officer, is an escape, as such person has no authority to detain him.³ And the sending a person in custody on mesne process, to give evidence at an examiner's court, even though in the custody of the jailer, and the place of holding the court is in the same county, is an escape.⁴

§ 602. It is an escape where the sheriff holds one on final process, if he suffers him to be taken from his custody, upon the warrant of a justice, upon a criminal charge. His prior possession of the prisoner upon the civil process, is superior to that of any subsequent criminal process, and if he suffers him to be so taken from his custody, he will be liable therefor.⁵ But it was held otherwise where the prisoner was taken by the sergeant at arms of the House of Representatives of the United States and carried to Washington.⁶

§ 603. Where one is on the liberties of the jail, the going beyond the line thereof, knowingly and voluntarily, even for the purpose of avoiding a snow bank, is an escape for which the sheriff is liable. And so where the liberties were not defined, and the prisoner went beyond them, into a building which was supposed to be within the limits and staid an hour, it has been held to be an escape.⁷ Where one is allowed the limits, and is afterwards committed to close confinement on a criminal charge, and breaks the jail and escapes, the sheriff will be liable for the escape, but not the sureties to the bond.⁸

§ 604. The plaintiff's attorney, as such, has no authority to authorize the sheriff to permit a defendant in his custody on final process, to go at large without payment of the execution, and if the sheriff does permit him to go at large by consent of the attorney, knowing that the judgment is not satisfied, as where by direction of the attorney he allows him to go to seek for the means of settling the execution, it will be an escape.⁹ But the plaintiff's attorney of record, is by his general retainer, authorized to acknowledge satisfaction of a judgment obtained by him as such attorney, at any time within two years after the filing of the record, in the same manner and with the like effect as if made by the party himself. And when such attorney shall have acknowledged satisfaction, and the same is filed, and the sheriff has

¹ 2 O. R. 348, *Brown Co. v. Butts*.

² 6 O. R. 13 *Richardson v. Spencer*; 13 O. R. 177, *Kepler v. Barker*.

³ 9 John. 329, *Palmer v. Hatch*.

⁴ *Sewell*, 443.

⁵ 9 How. 93, *Brown v. Tracy*.

⁶ 21 How. 40, *Wickelhausen v. Willett*.

⁷ 5 John 89, *Bissell v. Kip*.

⁸ 3 Cow. 128, *Bradford v. Consaulus*.

⁹ 6 John. 51, *Crary v. Turner*; 10 John. 220, *Kellogg v. Gilbert*.

no knowledge that the authority of such attorney has been revoked before such acknowledgment, it will be a good defence to an action for an escape, where one is discharged or leaves the limits after such satisfaction piece has been filed and entered upon the docket.¹ Where a third person directs the discharge of a party from arrest, his authority to do so must be clear and explicit.² Where a judgment is for costs alone, the attorney has a lien thereon, and the costs equitably belong to him, and if the execution shows upon its face the fact that such judgment is for costs only, it will be notice to the sheriff; and the party in whose name the judgment is rendered cannot give to the defendant authority to leave the limits, and if he does so, the sheriff will be liable for an escape.³ In an action for a penalty, where one-half thereof goes to the informer, the plaintiff cannot discharge the judgment as to the people's moiety of the penalty without payment, and if in such action, the defendant has been arrested, and is ordered to be discharged by the plaintiff without satisfaction, the officer will be liable for an escape if he suffers him to go.⁴

§ 605. If a prisoner is discharged from arrest in any civil cause, by a court or officer without authority, it is an escape, for which the sheriff is liable.⁵ Thus a justice of the peace has no authority to discharge a prisoner on execution issued by him, without special power for that purpose from the plaintiff in the suit. And if a constable who has a defendant on execution, discharge him by order of the justice, who has no authority from the plaintiff, the constable will be liable for an escape.⁶ But if the court has jurisdiction, it is immaterial if the proceedings are irregular, unless the officer is a participator in the irregularity. Thus the discharge of a prisoner on habeas corpus by a supreme court commissioner, though erroneous, was held a complete bar to an action for an escape.⁷ But where by statute, a county judge can only discharge an insolvent in court, the discharge of one out of term, is void for want of jurisdiction, and if the prisoner is discharged in pursuance thereof, it will be an escape. And the discharge of one alleged to be a lunatic, under the statute organizing the state lunatic asylum, is void, unless the order directs him to be sent to the asylum.⁸ A writ of error only stays proceedings, it does not authorize the discharge of a prisoner in execution, and if the sheriff does discharge him, it will be an escape.⁹ A prisoner arrested by

¹ 3 R. S. 640, § 32.

² 6 John. 51, *Crary v. Turner*.

³ 4 Barb. 47, *Wilkins v. Batterman*.

⁴ 11 John. 474, *Minton v. Woodward*.

⁵ 5 John. 115, *Jackson v. Smith*; 9 John. 146, *Van Slyck v. Taylor*; 15 John.

152, *Cable v. Cooper*; 8 Wend. 545 *Ames v. Webbers*.

⁶ 9 John. 146, *Van Slyck v. Taylor*.

⁷ 3 Barb. 37, *Wiles v. Brown*.

⁸ 5 Barb. 273, *Bush v. Pettibone*; 4 Com. 300, *Bush v. Pettibone*.

⁹ 21 Wend. 287, *Sherrill v. Campbell*.

virtue of an indorsed warrant, for an offence punishable in the state prison, cannot be let to bail in the county where the arrest is made, and if he is so let to bail, it is equivalent to suffering a voluntary escape, and the officer may retake him under the warrant. The distinction between voluntary and negligent escapes does not exist in criminal cases.¹

§ 606. If, while the defendant is in custody of the sheriff, another writ is delivered to him against the same party, the defendant is by such delivery in custody as well upon such second writ as upon the one on which he was arrested, and if he is discharged upon it, he must be detained on the second writ, or it will be an escape. If the first arrest was void however, he cannot be detained upon other process at the suit of the same plaintiff. But if such first arrest is only irregular, the defendant is not privileged from being detained at the suit of another party, unless there be some collusion.²

§ 607. On mesne process, the sheriff may permit the defendant to go at large, provided that he has him at the return day of the writ; but he cannot allow him to go at large after such return day.³ If he does not have him at the return day he will be liable for an escape; as where a constable arrested a defendant and allowed him to go at large until the return day, who was in the meantime arrested on criminal process, and could not be retaken, the constable was held liable for an escape.⁴

§ 608. But it is otherwise on final process, for if the sheriff allows the defendant to go at large, even for the shortest time, he cannot be retaken.⁵ And if the sheriff does retake him, after allowing him to go at large, he will be liable for false imprisonment.⁶ Nor can the sheriff in such case retake him, even if he surrenders himself, unless the plaintiff does some act showing his election to hold him on the old execution.⁷ And if in such case he take a bond from him for the liberties of the jail, it will be void.⁸ Where an execution is issued out of a justice's court, against the body of the defendant, although the constable has until the return day to make the arrest, yet if he arrests him before, it will be an escape if he suffers him to go at large, and it will not be excused by having him in custody at the return day.⁹

§ 609. Where the defendant escapes without the knowledge or assent

¹ 6 Hill 344, *Clark v. Cleveland*.

² *Watson*, 91.

³ 5 John. 182, *Stone v. Woods*; 6 John. 62, *Olmstead v. Raymond*; 10 Wend. 514, *Arnold v. Steeves*.

⁴ 6 John. 62, *Olmstead v. Raymond*.

⁵ 6 Hill 344, *Clark v. Cleveland*; 15 John.

256, *Thompson v. Lockwood*; 4 John. 45, *Tillman v. Lansing*.

⁶ *Sewell* 441.

⁷ 2 John Ca. 3, *Lansing v. Fleet*; 15 John. 256, *Thompson v. Lockwood*; 1 Wend. 398, *Littlefield v. Brown*.

⁸ 15 John. 256, *Thompson v. Lockwood*.

⁹ 13 John. 503, *Pulver v. McIntyre*.

of the sheriff, whether it be from the officer on arrest, or from the jail or the liberties, the sheriff may, on fresh pursuit, retake the prisoner wherever he can find him, whether within the limits of his county or beyond it, and he may break open doors, on demand and refusal, necessary to come at him, and he may be retaken at any time, whether on Sunday or any other day. His bail have the same power to retake him as bail in criminal cases.¹

§ 610. If the escape was without the consent of the sheriff or other officer, it will be a good defence to any action therefor, that before the commencement of such suit such prisoner voluntarily returned to the jail from which he had escaped, or to the liberties thereof; or that such defendant retook such prisoner and had him in the jail from which he escaped, or within the liberties thereof.² But a voluntary escape will not be purged by such return, or retaking, without affirmation by the plaintiff.³

§ 611. An irregularity in the process which does not render it void, but voidable only, will not excuse an escape.⁴ Thus a wrong teste in the name of the chief justice, has been held not such an irregularity as would excuse the sheriff for not executing such process.⁵ The sheriff can never allege error either in the judgment or process, as an excuse for an escape.⁶ Nor can he defend upon the ground that the plaintiff was not entitled to the original judgment.⁷ But he may shew that the defendant was not liable to arrest.⁸ A forged satisfaction piece, entered on the docket, but not entered on the record, was held not to be a justification of the sheriff, for an escape where the sheriff did not act under such forged satisfaction piece, but the defendant being on the limits, left of his own accord.⁹ Nor is the death of the defendant before action an excuse.¹⁰ Nor will the fact that the escape was without the knowledge or fault of either the sheriff or jailer excuse him. The fact that the prisoner has been arrested and committed on a previous attachment for the same cause, and discharged from custody with the assent of the plaintiff, is not an excuse for an escape.¹¹ The assent of the plaintiff, subsequent to an escape, to the defendant's leaving the limits, will not excuse the escape.¹²

§ 612. It has been held that going two or three miles out of the

¹ Ante, § 137.

[v. Chester.

² 3 R. S. 736, § 85 : 2 Conn. 473, Drake

³ 3 Com. 331, Wesson v. Chamberlain.

⁴ Watson 139; 13 John. 529, Hinman v. Brees; Id. 378, Scott v. Shaw.

⁵ 4 Cow. 153, Ross v. Luther; 6 How. 73, Hutchinson v. Brand; 5 Seld. 208 S. C.; 8 Cow. 192, The President, &c., of Ontario Bank v. Hallett; 13 John. 378, Scott v. Shaw.

⁶ 6 How. 73, Hutchinson v. Brand.

⁷ 3 Com. 331, Wesson v. Chamberlain.

⁸ 13 Wend. 68, Phelps v. Barton; 11 John. 433, Ray v. Hogeboom; 1 Keyes 510, Carpenter v. Willett.

⁹ 7 Wend. 35, Lownds v. Remsen.

¹⁰ 4 How. 297, Tanner v. Hallenbeck.

¹¹ 8 Wend. 545, Ames v. Webbers.

¹² 16 John. 181, Sweet v. Palmer; 7 Cow 274, Powers v. Wilson.

direct road to the jail, in order that the prisoner might obtain the means of satisfying the execution; or going with him that distance to his home in order that he might get his necessary wearing apparel, and see his wife before he went to jail, was not an escape, it being no more than a reasonable indulgence from laudable and compassionate motives.¹ And when one is arrested on a civil or criminal charge, the officer may carry him through such parts of any other county as shall be in the ordinary route of travel from the place of the arrest to the place where he is to be carried, and such conveyance shall not be deemed an escape.² The removal of a prisoner from one jail to another in the same county, or to the jail of another county, in the cases where the sheriff may so remove any prisoner; or the removal of a prisoner from the jail in case of a fire therein, or of any pestilence or contagious disease in the jail or vicinity, as prescribed in the statute, shall not be deemed an escape.³ And it will not be deemed an escape if the jail is broken open and the prisoners liberated, by the public and foreign enemies, or where the escape is in consequence of the act of God, or of a fire in the jail; but it will be otherwise if the jail is broken open by a mob.⁴ An involuntary departure will not be an escape, as in case of sudden sickness the prisoner is removed beyond the liberties of the jail without any agency or direction of his own. Where one is on the limits and another execution is delivered to the sheriff and the defendant leaves the limits, the fact of the delivery of the last execution is not of itself such an arrest as to place the defendant in custody on such last execution, and the sheriff will not be liable for an escape.⁵ And if the first arrest of one is void, the prisoner cannot be detained by subsequent process at the suit of the same plaintiff, and if he escapes the sheriff will not be liable.⁶ Where the defendant was seen off the limits on Sunday by the creditor, who held out inducements to him to remain off until Monday, with the intent to fix the sheriff with the escape, it was held that the device of the creditor was fraudulent and that he was not entitled to sustain an action against the sheriff for the escape.⁷ So if a creditor by his agent or person acting in concert with the agent, shall by artifice or fraud induce the debtor to escape, the sheriff is not responsible.⁸ The sheriff will not be liable for an escape if the execution or judgment is void.⁹

¹ 10 John. 420, *Wool v. Turner*.

² 3 R. S. 1043, § 53; *Id.* 724, §§ 6, 7.

³ *Ante*, §§ 215, 216.

⁴ *Watson* 140.

⁵ 8 John. 319, *Tracy v. Whipple*.

⁶ *Watson* 91.

⁷ 10 Wend. 356, *Van Wormer v. Van Voast*; 2 Conn. 473, *Drake v. Chester*.

⁸ 2 Denio 346, *Dexter v. Adams*.

⁹ 1 Root (Conn.) 288, *Austin v. Fitch*.

§ 613 Any agreement made with a sheriff, by which a party under arrest is permitted to go at large upon any terms other than those prescribed by the statute is void; and so is any agreement taken by him from any party in custody, intended as an indemnity to the sheriff, for a breach of his duty.¹ If the sheriff take a promissory note in satisfaction in an execution, and discharge the defendant without authority from the plaintiff, it is void as between the sheriff and the maker of the note, and such sheriff is liable for an escape.² Where an officer having one on execution, another promised that if he would release him, such person would pay the amount of the execution if the defendant failed to redeliver himself to the officer, and the latter released him accordingly, it was held that this was a voluntary escape and that the officer could maintain no action against the person promising, on the nonperformance of his agreement.³ Receiving anything but money, even a draft, in payment of the execution, and allowing the defendant to go at large, is an escape.⁴

§ 614. Where an escape has occurred, the commencement of an action against the sheriff therefor, is an election to consider the defendant out of custody, and such defendant ceases to be in judgment of law in the custody of the sheriff, until again charged in execution, and he may leave the jail or the liberties thereof with impunity, and another action for an escape will not lie.⁵ This, however, must be understood to be where the escape was voluntary, for if it was negligent, the sheriff may retake the prisoner and detain him until he is indemnified for the escape.⁶ If a new sheriff receives a prisoner from the old sheriff, he is bound to keep him, notwithstanding there was a voluntary escape while he was in the custody of the former sheriff; and if he allows him to go at large it will be an escape. However, if the plaintiff sue the former sheriff for an escape, it is an election that he does not consider the defendant in execution, and he cannot afterwards sue the new sheriff for an escape, if the prisoner, after such first suit goes at large.⁷ Where an escape occurred, and the sheriff went out of office, and after the appointment of the new sheriff, the prisoner applied for his discharge as an insolvent, and was opposed by the creditor, it was held not to be such an election to hold the defendant, as to bar an action against the former sheriff for the escape.⁸

§ 615. If, in consequence of a voluntary escape, the sheriff has to

¹ 1 Com. 365, *Winter v. Kinney*; 13 John. 366, *Wheeler v. Bailey*.

² 6 Cow. 465, *Armstrong v. Garrow*.

³ 13 John. 366, *Wheeler v. Bailey*;
3 Com. 331, *Wesson v. Chamberlain*.

⁴ Ante, § 568.

⁵ 7 Wend. 454, *Brown v. Littlefield*;
11 Wend. 467, *Brown v. Littlefield*.

⁶ *Watson*, 150.

⁷ 4 John. 469, *Rawson v. Turner*.

⁸ 7 John. 477, *Dash. v. Vankleeck*.

pay the debt, he cannot recover the same of the defendant.¹ But it is otherwise of a negligent escape, and though fresh pursuit is not made, yet if the plaintiff has brought suit for the escape, the sheriff may retake him and detain him until he is satisfied by him for the escape, if the plaintiff recover for a negligent escape.²

§ 616. Where the sheriff is ordered by a writ of habeas corpus to bring up the body of a prisoner in execution, if it is valid on its face, though irregularly or erroneously allowed, the sheriff will be protected in his obedience to it.³ But it is his duty to convey the prisoner by the shortest and most convenient route in the court or officer where the writ is returnable. And if he goes elsewhere with the prisoner to accommodate him, or suffers him to go at large about his own affairs, although he has him at the return of the writ, it will be an escape. And so where a habeas corpus issues at one term to bring up a prisoner who is in execution before the court at the ensuing term thereof, if the sheriff lets him go at large in the meantime, it is an escape, although he appears with him in custody at the return of the writ.⁴ Where the prisoner is so brought up on habeas corpus, and the officer before whom the same is returnable, instead of committing the prisoner to the custody of the sheriff pending the decision of the habeas corpus, directs such sheriff to let him go at large, it will not excuse the sheriff if he lets him go at large, but he will be liable for an escape. Where one in prison is brought up by the sheriff on habeas corpus, before a judge or commissioner who is at a distance from the prison, and such defendant is to be detained only a short time, so that it would be inexpedient to be at the trouble and expense of transporting him back to jail for safe keeping, until the decision upon the habeas corpus, it will not be an escape, or a condemning the process of the court for such sheriff to detain him in actual custody out of the common jail. But as the prisoner in such case is still in the custody of the sheriff, under the original process of commitment, as well as under the order of the judge, it is an escape if the sheriff voluntarily suffers him to go at large without restraint. The writ of habeas corpus and the commitment to the sheriff, who brings the prisoner up until the cause can be disposed of, is an excuse to the sheriff for not having the prisoner in his custody in the common jail in the meantime, where it cannot be conveniently done. But such commitment to him is no discharge of the original arrest, so as to excuse the sheriff for permitting him to escape or go at large.⁵

¹ Graham's Pr. 149.

² Watson, 150.

³ 5 John. 357, Noble v. Smith; 5 Cow. 176, Wattles v. Marsh.

⁴ 10 Paige 606, The People ex rel. Backus v. Stone; Sewell 443.

⁵ 10 Paige 606, The People ex rel. Backus v. Stone.

§ 617. An action against the sheriff for an escape must be brought within one year after the escape occurred.¹

CHAPTER XXXVI.

WRITS OF HABEAS CORPUS AND CERTIORARI. ^a

§ 618. Every person committed, detained, confined or restrained of his liberty, within this state, for any criminal or supposed criminal matter, or under any pretence whatsoever, may prosecute a writ of habeas corpus or of certiorari, according to the provisions of the statute, to inquire into the cause of such imprisonment or restraint, except,

1. Persons committed or detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States; or shall have acquired exclusive jurisdiction by the commencement of suits in such courts;

2. Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree; but no order of commitment for any alleged contempt, or upon proceedings as for contempt, to enforce the rights or remedies of any party, shall be deemed a judgment or decree within the meaning of the statute; nor shall any attachment or other process issued upon any such order, be deemed an execution within the statute.¹

§ 619. Any officer or other person refusing to deliver a copy of any order, warrant, process or other authority, by which he shall detain any person, to any one who shall demand such copy, and tender the fees therefor, shall forfeit two hundred dollars to the person so detained.²

§ 620. Writs of habeas corpus and certiorari may be granted,

¹ Code, § 94.

² 3 R. S. 883, §§ 35, 36; 6 Barb. 366, *The People ex rel. Davenport v. Kling*.

³ 3 R. S. 892, § 88.

^a Ark.—Dig. 1858, p. 578.
Cal.—Dig. 1860, p. 473.
Conn.—Rev. 1866, p. 87.
Pa.—Dig. 1847, p. 527.
Ga.—Code p. 763.
Ind.—2 R. S. p. 194.
Ia.—Rev. 1860, p. 672.
Kan.—Gen. St. 1868, p. 761.
Ky.—1 R. S. 584.
Me.—R. S. 593.
Md.—1 Code, 319.
Mass.—St. 1860, p. 733.
Mich.—St. 1857, p. 1370.
Miss.—Rev. Code, 365.

Mo.—Gen. St. 1865, p. 622.
Neb.—R. S. 658.
N. H.—Gen. St. 1867, p. 455.
N. J.—Dig. 1858, p. 320.
N. C.—Laws 1863, p. 31; Laws 1869, p. 291.
O.—1 R. S. 681.
On.—Gen. L. 299.
Penn.—Dig. 1861, p. 519.
R. I.—R. S. 496.
Tenn.—Code, p. 673.
Vt.—Gen. St. 1863 p. 346.
Va.—Code 1849, p. 613.
Wis.—R. S. 906.

1. By the supreme court, during its sittings, or at a special term thereof;¹

2. During any term or vacation of the supreme court, by any of the justices thereof, or by any officer authorized to perform the duties of justice of the supreme court at chambers, being or residing within the county where the prisoner is detained; or if there be no such officer within such county, or if he be absent, or for any cause be incapable of acting, or have refused to grant such writ, then by some officer having such authority, residing in an adjoining county.² The writ cannot be granted by a judge of any county court of New York.³

§ 621. When the writ is granted by the supreme court, or any justice thereof, where the prisoner is confined in a county other than where such court shall then be held, or officer reside, such court or officer may in their discretion make such writ returnable before some officer authorized to issue such writ, in the county where the prisoner may be confined.⁴ After the court of oyer and terminer shall commence its sittings in any county, no prisoner detained in the common jail of any such county upon any criminal charge, shall be removed therefrom by any writ of habeas corpus, unless such writ shall be made returnable before it.⁵

§ 622. By the writ of habeas corpus, the sheriff, or other officer, or person in whose custody or restraint the prisoner may be, is commanded, that at the time and place therein mentioned he have the said prisoner with the time and cause of such imprisonment and detention.⁶ And by the writ of certiorari, such officer or person having any such prisoner in custody, is commanded that he certify fully and at large, to the court or officer issuing the writ, at a time and place therein mentioned, the day and cause of the imprisonment of the prisoner.⁷ Writs of habeas corpus and certiorari or discharge shall be under the seal of the court by which they are awarded. If awarded by any officer out of court, they shall be under the seal of the court before which the writ is made returnable; or if it be made returnable before some body, other than a court of record, or before an officer out of court, it shall be under the seal of the supreme court.⁸ Every such writ may be made returnable at a day certain, or forthwith, as the case may require;⁹ and shall be indorsed with a certificate that the same has been allowed, and with the date of such allowance; which indorsement, if the writ be awarded by a court, shall be signed

¹ 12 Wend. 229, Ex parte Beatty.

² 3 R. S. 883, § 37.

³ 36 N. Y. 606, Nash. v. The People; 46 Barb. 27, The People v. Russell.

⁴ 3 R. S. 885, § 43.

⁵ 3 R. S. 884, § 41.

⁶ 3 R. S. 884, § 41.

⁷ 3 R. S. 885, § 42.

⁸ 3 R. S. 893, § 90.

⁹ 3 R. S. 893, § 91.

by the chief justice, or other presiding officer of such court; if it be awarded by any officer out of court, the indorsement shall be signed by such officer.¹

§ 623. Such writs of habeas corpus or certiorari, shall not be disobeyed for any defect of form. They shall be sufficient,

1. If the person, having the custody of the prisoner, be designated either by his name of office, if he have any; or by his own name; or if both such names be unknown or uncertain, he may be described by an assumed name or appellation; and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person;

2. If the person who is directed to be produced be designated by name; or if his name be uncertain or unknown, he may be described in any other way so as to designate the person intended.²

§ 624. Writs of habeas corpus can only be served by an elector of some county within this state; and the service thereof shall not be deemed complete unless the party serving the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable or marshal, the fees allowed by law for bringing up such prisoner; nor unless he shall also give bond to such sheriff, coroner, constable or marshal, as the case may be, in a penalty double the amount of the sum for which such prisoner may be detained, if he be detained for any specific sum of money, and if not, then in the penalty of one thousand dollars, conditioned that such person will pay the charges of carrying back such prisoner, if he shall be remanded, and that such prisoner will not escape by the way, either in going to or returning from the place to which he is to be taken. But such payment of fees, or such bond shall not be necessary where the writ is sued out by the attorney general, or by any district attorney.³ The officer granting a writ directed to any other person than a sheriff, coroner, constable or marshal, may in his discretion, require as a duty to be performed, in order to render the service thereof effectual, that the charges of bringing such prisoner, shall be paid by the petitioner; and in such case he shall in the allowance of the writ, specify the amount of such charges so to be paid, which shall not exceed the fees allowed by law to sheriffs for similar services.⁴

§ 625. Every writ of habeas corpus or certiorari, may be served by delivering the same to the person to whom it is directed; if he cannot be found, it may be served by being left at the jail or other place in

¹ 3 R. S. 893, § 92.

² 3 R. S. 885, § 44.

³ 3 R. S. 893, §§ 94, 95.

⁴ 3 R. S. 894, § 100.

which the prisoner may be confined, with any under officer, or other person of proper age, having charge for the time, of such prisoner; and if the person on whom it ought to be served, conceal himself, or refuse admittance to the party attempting to serve the same, it may be served by affixing the same in some conspicuous place, on the outside, either of his dwelling house, or of the place where the party is confined.¹

§ 626. It shall be the duty of every sheriff, coroner, constable or marshal, upon whom a writ of habeas corpus shall be served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond mentioned, to obey and return such writ according to the exigency thereof; and it shall be the duty of every other person upon whom such writ shall be served, having the custody of the individual for whose benefit the writ shall be issued, to obey and execute such writ, according to the command thereof, without requiring any bond, or the payment of any charges, unless the payment of such charges shall have been required by the officer issuing such writ;² and he shall bring the body of the person in his custody, according to the command of such writ, except in the case of the sickness of such person, as hereinafter mentioned.³ If the writ be returnable at a certain day, such return shall be made, and such prisoner shall be produced at the time and place specified therein; if it be returnable forthwith, and the place be within twenty miles of the place of service, such return shall be made, and such prisoner shall be produced, within twenty-four hours; and the like time shall be allowed for every additional twenty miles.⁴ The sheriff must convey the person to the court or officer by the shortest and most convenient route, and if he suffers him to go elsewhere about his own business, though he have him at the return of the writ, it will be an escape. And if a habeas corpus issue in one term to the sheriff to bring up a prisoner in his custody in execution on the ensuing term, if he let him go at large in the meantime, it is an escape.⁵ And he must be detained in the custody of the officer during the pendency of the writ, or until he is committed to the care of some other person by the order of the court or officer before whom the writ is returnable.⁶ And if he is suffered to go at large during the pendency of such proceedings, it will be an escape. If the prisoner is brought before a judge or commissioner, at a place distant from the jail, and such defendant is to be detained a short time only, and it

¹ 3 R. S. 894, §§ 96, 97.

² 3 R. S. 894, § 98.

³ 3 R. S. 886, § 48.

⁴ 3 R. S. 894, § 101.

⁵ Sewell 443; Watson 139.

⁶ 3 R. S. 888, § 60.

would be inexpedient to transport him back to the jail for safe custody until the decision upon the habeas corpus, it will not be an escape, or a contemning of the process of the court, for the sheriff to detain him in actual custody, out of the common jail, although the prisoner is committed to the custody of the sheriff by the officer during the pendency of such proceedings.¹ It is the duty of a sheriff bringing up a prisoner upon habeas corpus, to have sufficient force to prevent a rescue or escape of such prisoner.²

§ 627. The person upon whom any such writ shall have been duly served, shall state in his return, plainly and unequivocally,

1. Whether he have or have not the party in his custody, or under his power or restraint;

2. If he have the party in his custody or power, or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large;

3. If the party be detained by virtue of any writ, warrant or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ, to the court or officer before whom the same is returnable;

4. If the person upon whom such writ shall have been served, shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority, such, transfer took place;

5. The return must be signed by the person making the same; and except where such person shall be a sworn public officer, and shall make his return in his official capacity, it shall be verified by his oath.³ If the return is evasive the court will attach the officer making it.⁴

§ 628. A return that the person was not in the custody of the officer served is defective. And so a return that he had not at the time of receiving the writ, nor had he since, the body of the defendant in his custody, so that he could comply with the writ, is bad.⁵ If the person served have not the party, his return should be in the language of the statute, that he has not the party in his custody or under his power or restraint. If the sheriff goes out of office and his successor qualifies before the return, such return should be in the name of both. By the old sheriff that he delivered the body to the new sheriff, and

¹ 10 Paige 606, *The People ex rel. Backus v. Stone*.

² Sewell 308.

³ 3 R. S. 885, § 47.

⁴ 10 John. 323, *In the matter of Stacy*.

⁵ 10 John. 323, *In the matter of Stacy*; Watson 167.

by the new sheriff, that he has his body according to the command of the writ.¹ A return to a writ by a proper officer, *prima facie*, imports verity, and until it is impeached, need not be supported by affidavit or otherwise, except as mentioned in the next section. The court will permit a return to be amended, even after it is filed.²

§ 629. Whenever, from the sickness, or infirmity, or lunacy,³ of the person directed to be produced by any writ of habeas corpus, such person cannot, without danger, be brought before the court or officer before whom the writ is made returnable, the party in whose custody he is, may state that fact in his return to the writ, verifying the same by his oath; and if such court or officer be satisfied of the truth of such allegation, and the return be otherwise sufficient, they shall proceed to decide upon such return, and to dispose of the matter, in the same manner as if a writ of certiorari had been issued, instead of such writ of habeas corpus.⁴

§ 630. Until judgment be given upon the return, the court or officer before whom such party shall be brought, may either commit such party to the custody of the sheriff of the county in which such court or officer shall be, or place him in such care, or under such custody, as his age and other circumstances may require.⁵

§ 631. Where it appears from the return to any such writ, that the party named therein is in custody on any process, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge, until it shall appear that the party so interested, or his attorney, if he have one, shall have had the like notice of the time and place at which such writ shall have been made returnable, as is required to be given of special motions in the supreme court of this state.⁶ And where it shall appear from the return, that such party is detained upon any criminal accusation, such court or officer shall make no order for the discharge of such party, until sufficient notice of the time and place at which such writ shall have been returned, or shall be returnable, shall be given to the district attorney of the county in which the person prosecuting the writ shall be detained.⁷

§ 632. If on the return of the writ, no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, such court or officer shall discharge such party from custody or restraint

¹ Watson 168.

² Sewell 313.

³ Watson 168.

⁴ 3 R. S. 889, § 65.

⁵ 3 R. S. 888, § 60.

⁶ 3 R. S. 888, § 61; 12 Wend. 229, *Ex parte David Beatty*.

⁷ 3 R. S. 888, §§ 62, 63; 5 Hill 164, *The People v. Cassels*.

under which he is held.¹ If the officer has no jurisdiction, the discharge will be void, and the prisoner may be recommitted.²

§ 633. It shall be the duty of such court or officer forthwith to remand such party if it shall appear that he is detained in custody, either,

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction ; or,

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree ; or,

3. For any contempt specially and plainly charged in the commitment, by some court, officer, or body, having authority to commit for the contempt so charged ; and,

4. That the term during which such party may be legally detained has not expired.³

§ 634. If it appear on the return, that the prisoner is in custody by virtue of civil process, from any court legally constituted, or issued by any officer in the course of judicial proceedings before him authorized by law, such prisoner can only be discharged, in one of the following cases :

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person ;

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged ;

3. Where the process is defective, in some matter of substance required by law, rendering such process void ;

4. Where the process, though proper in form, has been issued in a case not allowed by law ;⁴

5. Where the person having the custody of the prisoner under such process, is not the person empowered by law to detain him ; or,

6. Where the process is not authorized by any judgment, order, or decree of any court, nor by any provision of law.⁵

§ 635. But no court or officer, on the return of habeas corpus or certiorari, issued pursuant to the statute, shall have power to inquire into the legality or justice of any process, judgment, decree or execu-

¹ 3 R. S. 887, § 54.

⁴ John. 317, In the case of John Van Ness Yates ; 9 John 395, Yates v. Lansing ; 10 Paige 284, The People ex rel. Backus v. Spaulding ; 7 Hill

301, Spaulding v. The People ex rel. Backus.

² 3 R. S. 887, § 55 ; 4 Keyes 38, The People v. Cowles.

⁴ 4 Barb. 31, Bennac v. The People.

⁵ 3 R. S. 887, § 56.

tion, specified in the first section of this chapter; nor into the justice or propriety of any commitment for a contempt made by any court, officer or body, according to law, and charged in such commitment as provided by statute.¹ But such court or officer may inquire if the process be actually void, or valid on its face, and whether the committing magistrate had jurisdiction, notwithstanding the recital of the necessary jurisdictional facts in the commitment.² And where one is committed for contempt for refusing to answer as a witness, though the court or officer before whom the prisoner is brought on habeas corpus, has no right to inquire into the truth of the facts adjudged, nor whether the questions put to the witness were proper, nor whether he was privileged from answering, yet if the justice committing had no jurisdiction of the matter; as where a justice issued a warrant against one not in his county, and for an offence not committed therein, such witness may be discharged by such court or officer. But in such case, notice must first be given to the district attorney, or the discharge will be irregular.³ And where one is committed for actual contempt, a discharge under the bankrupt act does not operate to discharge him from a commitment for the nonpayment of a fine for such contempt, and a discharge on habeas corpus by a supreme court commissioner will be irregular.⁴

§ 636. If it appear that the party has been legally committed for any criminal offence, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offence, although the commitment be irregular, the court or officer before whom such party shall be brought, shall proceed to let such party to bail, if the case be bailable, and good bail be offered; or if not, shall forthwith remand such party to the custody, or place him under the restraint from which he was taken, if the person under whose custody or restraint he was, be legally entitled thereto; if not so entitled, he shall be committed by such court or officer to the custody of such officer or person, as by law is entitled thereto.⁵

§ 637. Instead of a habeas corpus, the court or officer may issue a certiorari, and upon the return thereto, such officer or court shall hear the proofs of the parties, and if it appear that the person detained is illegally imprisoned, confined or restrained of his liberty, the court or officer shall grant a writ of discharge commanding those having such person in their custody, to discharge him forthwith; and if it appear that such person is legally detained, imprisoned or confined,

¹ 3 R. S. 888, § 57.

² 4 Barb. 31, *Bennac v. The People*;

5 Hill 164, *The People v. Cassels*.

³ 5 Hill 164, *The People v. Cassels*.

⁴ 10 Paige 284, *The People ex. rel. Backus v. Spaulding*.

⁵ 3 R. S. 888, §§ 58, 59; 1 Park. Cr. R. 224; 3 Park Cr. R. 316.

and if not entitled to be bailed, such court or officer shall cease from all farther proceedings thereon.¹

§ 638. If upon the return to any writ of certiorari, it shall appear that the person detained is entitled to bail, the court or officer before whom the same is returnable, shall by order certified by the clerk of the court, or by the officer granting the same, direct the sum in which such person shall be held to bail, and the court at which he shall be required to appear, and that on such bail being entered into, in conformity to such order and the provisions of law, such prisoner be discharged. Upon the production of such order to any judge of the county courts of any county, he shall be authorized to take the recognizance of the person so detained, and of two sufficient sureties, in the sum so directed, with a condition for the appearance of such person at the court designated in such order. But previous to taking such recognizance, such judge shall be satisfied by the oath of the persons offering themselves as sureties, that they are householders in the county, and are severally worth double the sum in which they shall be required to be bound, over and above all demands against them. Such judge shall file the recognizance taken by him with the clerk of the court before which the prisoner shall be bound to appear, and shall certify on such order, the compliance therewith. The production of such order, so certified, shall entitle such prisoner to be discharged from imprisonment, for the cause which shall have been returned to such certiorari.²

§ 639. If the person upon whom such writ of habeas corpus or certiorari shall have been duly served, shall refuse or neglect to obey the same, by producing the party named in such writ of habeas corpus, and making full and explicit return to every such writ of habeas corpus or certiorari, within the time required by the statute, and if no such sufficient excuse shall be shown for such refusal or neglect, it shall be the duty of the court or officer before whom such writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person, directed to the sheriff of any county within this state, and if it be the sheriff who is in default, then to the coroner or any other person to be designated therein, who shall have full power to execute the same, and commanding him forthwith to apprehend such person, and to bring him immediately before such court or officer; and on such person's being so brought, he shall be committed to close custody, in the jail of the county in which such court or officer shall be, (but if

¹ 3 R. S. 889, §§ 66, 67 68.

² 3 R. S. 890, §§ 70-72.

the sheriff, he may be committed to any jail other than his own,) without being allowed the liberties thereof until he shall make return to such writ, and comply with any order that may be made by such court or officer in relation to the person for whose relief such writ shall have been issued.¹ And so such person making a default may be attached for a false return, but not unless it appears to have been done wilfully; and so such person may be attached where he makes an evasive return.²

§ 640. The court or officer by whom any such attachment may be issued, may also, at the same time or afterwards, issue a precept to the same sheriff or other person to whom such attachment shall have been directed, commanding him to bring forthwith before such court or officer, the party for whose benefit such writ of habeas corpus or certiorari shall have been allowed; who shall thereafter remain in the custody of such sheriff or person until he shall be discharged, bailed or remanded, as such court or officer shall direct. And in the execution of such attachment or precept, or either of them, the sheriff or other person to whom they shall be directed, may call in his aid the power of the county, as in other cases.³

§ 641. Obedience to any writ of discharge, or to any order for the discharge of any prisoner, granted pursuant to the provisions of the statute, as hereinbefore mentioned, may be enforced by the court or officer issuing such writ or granting such order, by attachment, in the same manner as herein provided, for a neglect to make return to a writ of habeas corpus, and with the like effect, in all respects; and the person guilty of such disobedience, shall forfeit to the party aggrieved, one thousand two hundred and fifty dollars, in addition to any special damages such party may have sustained.⁴

§ 642. Whenever it shall appear by satisfactory proof, that any one is held in illegal confinement or custody, and that there is good reason to believe that he will be carried out of the state, or suffer some irreparable injury, before he can be relieved by the issuing of a habeas corpus or certiorari, any court or officer authorized to issue such writs, may issue a warrant under his hand and seal, reciting the facts, and directed to any sheriff, constable, or other person, and commanding such officer or person to take such prisoner, and forthwith to bring him before such court or officer, to be dealt with according to law.⁵ When such proof shall also be sufficient to justify an arrest of the person having such prisoner in his custody, as for a criminal offence

¹ 3 R. S. 886, §§ 49, 50.

² Sewell 315; 10 John. 328, In the matter of Stacy.

³ 3 R. S. 887, §§ 52, 53.

⁴ 3 R. S. 880, § 73.

⁵ 3 R. S. 891, § 81.

committed in the taking of or detaining such prisoner, the warrant shall also contain an order for the arrest of such person for such offence.¹ And the officer or person to whom such warrant shall be directed, shall execute the same by bringing the prisoner therein named, and the person who detains him, if so commanded by the warrant, before the court or officer issuing the same; and thereupon the person detaining such prisoner shall make return, in like manner and the like proceedings shall be had as if a writ of habeas corpus had been issued in the first instance.² If the person having such prisoner in his custody shall be brought before such court or officer, as for a criminal offence, he shall be examined, committed, bailed or discharged by such court or officer in like manner, as in other criminal cases of the like nature.³

§ 643. No person who has been discharged by the order of any court or officer, upon habeas corpus or certiorari, issued pursuant to the provision of the statute, as hereinbefore mentioned, shall be again imprisoned, restrained or kept in custody, for the same cause; but it shall not be deemed the same cause,

1. If he shall have been discharged from a commitment on a criminal charge, and be afterwards committed for the same offence, by the legal order or process of the court, wherein he shall be bound by recognizance to appear, or in which he shall be indicted or convicted for the same offence; or,

2. If, after a discharge for a defect of proof or from any material defect in the commitment, in a criminal case, the prisoner may be again arrested on sufficient proof, and committed by legal process for the same offence; or,

3. If, in a civil suit the party has been discharged for any illegality in the judgment or process herein before specified, and is afterwards imprisoned by legal process for the same cause of action; or,

4. If, in any civil suit, he shall have been discharged from commitment on mesne process, and shall afterwards be committed in execution, in the same cause, or on mesne process, in any other cause, after such first suit shall have been discontinued.⁴

§ 644. If any person, either solely, or as a member of any court, or in the execution of any order, judgment or process, shall knowingly recommit, imprison or restrain of his liberty, or cause to be recommit, imprisoned or restrained of his liberty, for the same cause, except as provided in the last section, any person so discharged, or shall knowingly aid or assist therein, he shall forfeit to the party

¹ 3 R. S. 892, § 82.

² 3 R. S. 892, § 83.

³ 3 R. S. 892, § 84.

⁴ 3 R. S. 890, § 75.

aggrieved one thousand two hundred and fifty dollars, and shall also be deemed guilty of a misdemeanor. And on conviction may be fined or imprisoned, or both; but such fine shall not exceed one thousand dollars, nor such imprisonment six months¹.

§ 645. Any one having in his custody or under his power, any person, who by the provision of the statute, as herein before mentioned, would be entitled to a writ of habeas corpus or certiorari, to inquire into the cause of his detention, who shall with intent to elude service of any such writ, or to avoid the effect thereof, transfer any such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor. And any one having in his custody or under his power, any person for whose relief a writ of habeas corpus or certiorari shall have been duly issued, who, with intent to elude the service of such writ, or to avoid the effect thereof, shall transfer such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor, and may be punished by fine or by imprisonment, or both, but such fine shall not exceed one thousand dollars, nor such imprisonment six months.²

§ 646. No sheriff or other officer shall be liable to any civil action for obeying any such writ or order of discharge; and if any action shall be brought against such officer for suffering any person committed to his custody to go at large, pursuant to any such writ or order, he may plead, or with his plea of the general issue, may give notice of the same in bar of such action.³

§ 647. If a party charged with misconduct, be in the custody of any officer, by virtue of an execution against his body, or by virtue of any process for other contempts, or misconduct, the court may award a habeas corpus to bring up the body of such person, to answer for such misconduct. In cases where a party is entitled to an attachment against any person, without the special order of the court, and such person shall be in custody, as specified in the last section, a writ of habeas corpus to bring up such person, may be allowed by any judge of the court, or by any officer authorized to perform the duties of such judge in vacation. Such writ shall authorize the sheriff in whose custody such person shall be, to remove and bring him before the court to which the same shall be returnable, and to detain him at the place where such court shall be sitting, until some order be made by the court for his disposition.⁴

¹ 3 R. S. 891, §§ 76, 80.

² 3 R. S. 891, §§ 77, 78, 80.

³ 3 R. S. 890, § 74.

⁴ 3 R. S. 851, § 7, 8, 9.

§ 648. If, upon the return of a habeas corpus issued by a justice of the supreme court, to bring before him any child detained by the society of Shakers, it shall appear that the child therein mentioned cannot be found, and satisfactory proof be made to the officer issuing the writ, that such child is secreted or concealed, by or among any society of Shakers in this state, he may issue his warrant directed to the sheriff of the county where the said child is suspected to be, commanding such sheriff, in the day time, to search the dwelling houses and other buildings of such society, or of any members thereof, or any other building or dwelling house specified in the warrant, for such child, and to bring him before such officer; and the sheriff shall forthwith execute such warrant.¹

§ 649. The allowance of writs of habeas corpus ad testificandum, and the proceedings thereunder have already been stated.² And in what cases and under what circumstances one in prison under the statute concerning the examination of insolvent debtors for refusing to be examined or to sign his examination may be discharged on habeas corpus, will be pointed out hereafter.³

CHAPTER XXXVII.

WRITS OF INQUIRY.

1. WRIT OF INQUIRY TO ASSESS DAMAGES IN AN ACTION.

§ 650. There are several forms of writs of inquiry. They are judicial process, and are issued out of courts of record, and directed and delivered to the sheriff of the proper county, by which he is commanded that by the oath of twelve good and lawful men of his county he diligently inquire of the matters stated and set forth in the said writ, and return the inquisition under his hand and the hands of such jurors to the court out of which such writ issued. The writ of inquiry by which the sheriff is commanded to assess the damages of a plaintiff in an action, is less frequently used now than formerly, as it has in such cases been in a great measure superceded by the provisions of the Code, and the course and practice of the courts, though it has not been entirely abolished. The duties of the officer executing any such writ, are judicial as well as ministerial in their character, yet it may be executed by the undersheriff, or by a deputy, as well as by the sheriff himself, to whom it is directed.⁴

§ 651. The writ must be executed on or before the return day thereof, and if executed after that day it will be void, and will be set

¹ 3 R. S. 242, § 5.

² Ante, §§ 201-207.

³ Post, 676.

⁴ 2 John. 63, Tillotson v. Cheetham.

aside by the court. But if the inquest is taken upon the return day, the verdict will be good though it is not rendered until after that day.¹ It cannot be executed upon Sunday, and the jury cannot retire upon Saturday night and bring in a verdict upon Sunday, unless they retired before twelve o'clock.²

§ 652. The officer to whom such writ is directed and delivered for execution, must summon twelve proper jurors of his county, to attend at the time and place appointed, to serve as jurors upon the inquest. The mode of summoning jurors, and who may be summoned and who excused, have already been pointed out.³ The officer should, as in all other cases where he is required to select the jurors himself, be careful to select those only who are competent jurors, who are not interested in the event of the suit, and are nowise akin to either of the parties, and who are unbiassed for or against either party, who have not expressed an opinion upon the question. If, at the time and place of hearing, and before the jurors are sworn, objection is made by either party to any juror summoned by the officer, he shall hear it, and if it is good and sufficient, he shall set the juror aside and summon another in his place; and if he refuses to do so, the court will set aside the inquest. The objection to the juror, however, must be stated openly to the officer, and not privately, and if so, and the sheriff sets aside the juror, the court will set aside the inquest.⁴ The truth of the objection may be determined upon the oath of the juror himself, if it do not tend to his dishonor, otherwise it must be proved by the testimony of others.

§ 653. The officer to whom the writ is directed and delivered for execution, presides upon the execution thereof. He swears the jurors and witnesses, and determines and directs the course of proceeding, and decides upon the admissibility of evidence; and in all these respects the proceedings are the same as in courts of justice. The officer has a discretion in adjourning the hearing, even after it has commenced, but if the defendant is ready, it can only be done on the application of the plaintiff, on the payment of costs. The adjournment must not be beyond the return day of the writ.

§ 654. In matters arising upon contract, the only question upon which testimony can be adduced upon taking an inquest before a sheriff's jury, is as to the amount of damages. The defendant may give evidence in mitigation of damages, but he cannot prove a set-off for the purpose of reducing such damages. Whether the plaintiff

¹ Watson 61, 221.

² 3 R. S. 467, § 16; 15 John. 177, Butler v. Kelsey.

³ Ante, §§ 161, &c.

⁴ 15 John. 177, Butler v. Kelsey.

proves any damages or not in such case, he is generally entitled to nominal damages.¹ But if the action be in tort, he must show his damages. Thus, where goods are taken, he need not show that the goods were his, but he must show their value. In slander no proof is necessary. But in an action for an injury to the person, a different rule prevails; and so in trespasses or trover for goods, actual damages must be shown, and the time when the injury was done. In actions upon penal bonds, it is made the duty of the jury to inquire into the truth of the breaches assigned by the plaintiff, and to assess the damages of the plaintiff sustained thereby.²

§ 655. After the jury have heard all the testimony they must retire, or consult apart, and make up their inquisition before hearing any other inquest, otherwise it will be set aside.³ And the sheriff must permit no one to mingle with the jury during their deliberations, and if he does it is irregular.⁴ The inquest must be in writing, and be signed by the sheriff and jurors, and is usually under seal, though this is not necessary; and the sheriff indorses his return upon the writ and delivers it to the plaintiff's attorney. The jurors are entitled to twelve and a half cents each, for serving, which must be paid by the plaintiff or by the sheriff, who charges the amount paid in his fees.

2. WRIT OF AD QUOD DAMNUM. ^a

§ 656. The writ of ad quod damnum is a writ of inquiry issuing out of the supreme court to assess the damages to the owner of any land sought to be taken for the use of the state, or of the United States; and is directed to the sheriff of the county where such lands are situated, unless the court shall direct such damages to be assessed by a foreign jury.⁵

§ 657. Upon such writ being delivered to the sheriff, he shall give at least three weeks notice of the time and place of executing the same, by publishing a notice thereof in a newspaper printed in his county. And he shall summon twelve qualified jurors of his county, to attend at such time and place, and shall then and there administer to each of said jurors, an oath that he will diligently inquire concerning the matters specified in the said writ, and will give a true verdict according to the best of his judgment, without favor or partiality, when such jury shall proceed to view all the lands and tenements

¹ 3 Cow. 296, Jackson ex d. Eden v. Rathbone.

² 3 R. S. 661, § 6.

³ 3 Wend. 478, Van Waggoner v. McDonald.

⁴ 3 Caines 96, Howell v. Denniston.

⁵ 3 R. S. 900, § 26; Id. 901, § 36.

^a Ala.—R. C. 1867, §§ 2490-2507.
Fa.—Dig. 1847, p. 401.

Miss.—St. Laws 190.
Neb.—R. S. p. 262.

specified in the writ; and having duly considered the value thereof, they shall proceed to assess the damages which the owner, or if there be several, which the respective owners of such lands and tenements will sustain by being deprived thereof. They shall make an inquisition to be signed by themselves and the sheriff, in which they shall set forth the names of the several owners of the lands and tenements in question, and the rights of each owner respectively, so far as the same can be ascertained by them, together with the amount to be paid by the people of this state, or by the United States, and to whom particularly, and also the owner's costs and expenses;¹ which inquisition the sheriff shall, forthwith return, together with the writ to the supreme court.²

3. WRIT OF INQUIRY UPON GOODS AND CHATTELS OF ONE CONVICTED OR OUTLAWED FOR TREASON.

§ 658. Whenever he shall deem it necessary, the attorney general may cause a writ to be issued out of the supreme court, to the sheriff of any county, to inquire what goods and chattels, any person convicted or outlawed for treason, had at the time of such conviction or outlawry, and to seize and safely keep the same, and return the inquisition to the supreme court, where any person aggrieved thereby may traverse the same. On the execution of such writ, the sheriff proceeds as in other cases. He summons and swears the jury and witnesses, and when the jurors have made and signed their inquisition, he shall sign the same also, and shall thereupon take the goods and chattels so found by the jury to be of the said person at the time of his conviction or outlawry, into his possession, and retain possession of the same, until a proper writ shall be issued out of the supreme court commanding him to sell the same, when he shall make sale thereof, and bring the moneys arising from said sale into court for the use of the people of this state.³

CHAPTER XXXVIII.

SPECIAL PROCEEDINGS.

1. WARRANT UNDER THE NONIMPRISONMENT ACT.

§ 659. The warrant is not a criminal, but a summary civil proceeding,⁴ for enforcing the payment of a debt, and may be granted by any

¹ 1 Barb. 24, *The U. S. v. Dumplin Island*.

² 3 R. S. 900, §§ 28, 29, 30.

³ 1 R. S. 689, §§ 3, 4.

⁴ 5 Hill, 605, *Moak v. De Forrest*. See *The People ex rel. Sharkey v. Good-*

win, 50 Barb. 562, which held that this act is not superceded by the provisions of the Code, and the City Judge of New York city has no jurisdiction to entertain the proceedings.

judge of the court in which the action is brought, or by any officer authorized to perform the duties of such judge, and by any judge of a court of record in any county in which the judgment on which the complaint is grounded is docketed, and in which the defendant resides.¹ If the warrant is issued before the summons is served by which the suit is commenced, it will be void, though the officer who executes it would not be a trespasser if it did not show such fact on its face.²

§ 660. The warrant is issued in the name of the people, and must be signed by the officer issuing the same, and may be with or without seal, and be directed to any sheriff, constable or marshal within the county where such officer shall reside, and shall therein briefly set forth the complaint, and command the officer to whom the same shall be directed, to arrest the person named in such warrant, and bring him before such officer without delay; which warrant shall be accompanied by a copy of all affidavits presented to such officer upon which the warrant issued, which shall be certified by such officer.³

§ 661. The officer to whom such warrant shall be delivered, shall execute the same, by arresting the person named therein, if he can be found in his county.⁴ The powers and duties of the officer on making the arrest, are the same as on civil process. On making the arrest, the officer shall deliver to the person so arrested, the certified copies of affidavits delivered to him with the warrant, and he shall bring him before the officer issuing the warrant, and shall keep him in custody until he is discharged or committed. And if he suffers him to escape, he will be liable to the plaintiff for his damages.⁵

§ 662. Upon bringing the defendant before the officer, he may, by commitment under his hand, direct that such defendant be committed to the jail of the county in which such hearing shall be had, to be there detained until he shall be discharged according to law; and such defendant shall be committed and detained accordingly; and when so committed he shall remain in custody in the same manner as other prisoners on criminal process, until a final judgment shall have been rendered in his favor in the suit prosecuted by the creditor at whose instance such defendant shall have been committed; or until he shall have assigned his property and obtained his discharge, as an insolvent debtor under the provisions of said law; or until he is discharged by the officer committing him, or any other person authorized to perform the duties of such officer, on such defendant paying the debt or demand claimed, or giving security for the payment thereof, under the provis-

¹ R. S. 126, §§ 6, 7.

² Ante, § 283.

³ R. S. 127, § 9.

⁴ 5 Hill 606, *Moak v. Deforest*.

16 Barb. 421, *Latham v. Westervelt*;

3 R. S. 127, §§ 9, 10.

ions of said act ; or on his executing the bonds mentioned in said act. Before the jailer discharges the defendant, he must be served with an order of discharge from the proper officer.¹ A debtor imprisoned under this act can only be discharged according to the provisions of the act, and not under the provisions of the Revised Statutes relative to "Proceedings by creditors to compel assignments by imprisoned debtors."²

§ 663. If the defendant has been convicted of a misdemeanor in secreting, assigning, or conveying, or otherwise disposing of any of his property with the intent to prevent the same from being levied upon by virtue of any execution, to defraud any creditor, or to prevent such property being made liable for his debts, the trustees appointed under the provisions of the said act, if they suspect that the person so convicted, has concealed about his person or otherwise, money or evidences of debt, upon making oath of the same before any judge of a county court, and on such judge being satisfied that such suspicions are well founded, he may issue a warrant authorizing and commanding any sheriff or constable to search the person of such defendant, and any place occupied by him, or any trunk or other article owned or possessed by him, for such money or evidences of debt, and to deliver what shall be so discovered, to such trustees.³

2. PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 664. When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides ; or if he does not reside in the state, to the sheriff of the county where the judgment roll, or a transcript of a justice's judgment, for twenty-five dollars or upwards, exclusive of costs is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution is issued to such city and county, requiring such judgment debtor to appear and answer concerning his property, before such judge, at a time and place specified in the order, within the county to which the execution was issued.⁴ Such order may be served by the sheriff, or by any other person, and the service must be made personally upon the defendant. He ought to be served sufficiently long before the time he is required to appear to allow him

¹ 3 R. S. 123, §§ 14, 17.

³ 3 R. S. 133, § 40.

² 54 Barb. 38, *The People ex rel. La Torre v. O'Brien*.

⁴ Code, § 292.

reasonable time to attend at the time and place specified. The service is made by delivering to the defendant a copy of the order, and at the same time showing him the original order under the hand of the judge or officer granting the same.

§ 665. After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court, or a judge thereof, or county judge, or any judge of the court of common pleas for the city and county of New York, that any judgment debtor residing in the county where such judge or officer resides, has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may by an order require the judgment debtor to appear at a specified time and place to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment, as are provided upon the return of an execution. Service of such order is made as in the case of the preceding order.¹

§ 666. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the state, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge.² It has been determined by a justice of the supreme court, at special term, that such warrant may be issued by a justice of the supreme court of the same judicial district in which the judgment was recovered, though the defendant does not reside in his county.³ The arrest under such warrant must be made as in the case of a warrant upon civil process, and all the rules in relation thereto, would seem to be applicable to such arrest; and the defendant should be brought forthwith before the judge or officer issuing such warrant; and the officer making the arrest must retain the defendant in his custody until he is discharged by the judge or officer issuing the warrant, or until he is committed by such judge to jail. When he is so committed, he must be committed to the jail of the county where the proceedings are had before the judge, and be confined there until he is duly discharged, as prisoners are confined in cases of contempts.⁴

3. PROCESS IN ACTIONS FOR PENALTIES.

§ 667. Upon every process issued for the purpose of compelling the

¹ Code, § 292.

² Code, § 292.

³ 9 How. 39, *Wilson v. Andrews*

⁴ Code, § 292.

appearance of any defendant to any action for the recovery of any penalty or forfeiture, shall be indorsed a general reference to the statute by which such action is given, in the following form, "According to the provisions of the statute regulating the rate of interest on money," or "according to the provisions of the statute concerning sheriffs," as the case may require, or in some other general terms referring to such statute.¹ The object of the statute is to give to the defendant notice of the offence for which he is prosecuted. And in a suit for a penalty under the excise law it has been held that an indorsement of "according to the act of the internal police of this state," is void for uncertainty.² If therefore, the process require the arrest of the defendant, it becomes important that the indorsement, as well as such process should be in due form, or be so specific in its character as to give to the defendant an idea of the nature of the charge.

§ 668. If the action is in the name of the informer, the process when served shall not be delivered to him by the officer, but the same shall be returned to the court from which the same issued.³ The process for the collection of a judgment for a penalty or fine under a statute, where the same is in the name of the informer, is to be executed like process in civil cases. But if the penalty, or fine, or any part thereof be given to the people, unless the statute provide otherwise, the officer may justify breaking open doors, to make a levy, or arrest the defendant when necessary, after a demand and refusal.⁴ And unless such statute declare otherwise, or place the execution upon the footing of civil process, no property of the defendant is exempt from levy or distress and sale on such execution. Where any such action is in the name of the informer, he has no right to settle or compromise the action without the payment of the whole recovery, and if he directs the release of the defendant from arrest on the execution, it will be void as to the people's moiety of the penalty, and the sheriff will be liable for an escape.⁵

4. ARREST IN AN ACTION FOR A PENALTY UNDER STATUTES RELATIVE TO THE MANUFACTURE OF SALT.

§ 669. Any process by which the defendant's body is to be taken in an action for a penalty under the statutes relative to the manufacture of salt, may be issued and served on Sunday, and the defendant held in custody for trial until a reasonable time on the day following,

¹ 3 R. S. 784, § 7; 22 Barb. 137, *Perry v. Tynen*; 19 Barb. 343, *Andrews v. Harrington*.

² 17 Wend. 85, *Avery v. Slack*.

³ 3 R. S. 784, § 6.

⁴ Barb. Cr. L. 546.

⁵ Ante, § 604.

if such process be issued by a justice of the peace. But if issued from any court of record, then the defendant shall be detained until he shall give bail, as in actions where the defendant is required to give bail. The bail in such case, shall be taken in the name of the sheriff, but he shall not be responsible for the sufficiency of the bail when the arrest is made by any person other than himself, or his deputies, unless the defendant shall have been actually committed to jail when he shall be responsible as in other cases.¹ Whenever a judgment shall be obtained before a justice of the peace against any person for any penalty or forfeiture under the act, and an execution be issued thereon, in case the officer having such execution shall not be able to levy the same on any property of the defendant, he shall commit the defendant to the jail of the county where he shall remain confined within the walls of the jail without bail, for the term of sixty days, unless he shall sooner pay or satisfy such execution; and every execution so issued shall contain a clause, ordering the defendant to be imprisoned, as above specified, unless property whereon to levy such execution shall be found by the officer to whom the same shall be directed. And whenever a judgment shall be recovered in a court of record for any penalty for forfeiture, and an execution thereon against property shall have been returned unsatisfied in whole or in part, the defendant upon any execution against his body, shall be imprisoned within the walls of the county jail in the manner before provided, one day for each dollar in the penalty recovered in such case and then remaining unpaid, without bail, unless he shall sooner satisfy such execution. And if at any time the defendant so committed to jail shall be found without the walls of the jail before he is entitled to his discharge, it shall be deemed an escape and the sheriff shall be liable for the amount due on the execution.²

5. EXECUTION OF PROCESS OF JUDICIAL OFFICERS.

§ 670. Every sheriff, constable, marshal or other officer, to whom shall be directed and delivered any attachment, summons, precept to summon a jury, warrant to apprehend a witness or any other person, or any other process authorized by law to be issued by a justice of the supreme court, judge of a county court, or justice of the peace, in any special proceeding or matter, before such judge, commissioner or justice, except civil suits before justices of the peace, shall execute such process, as therein commanded, and for any wilful neglect so to do, may be fined by the officer issuing the same, in a sum not exceeding twenty-five dollars.³

¹ 4 R. S. 39, §§ 129, 131.

³ 3 R. S. 865, § 3.

² 4 R. S. 39, §§ 134, 135, 136.

§ 671. When any sheriff, constable or other officer, who shall have summoned any jury as mentioned in the foregoing section, shall be required by the officer issuing the summons, to attend such jury and take charge of them, he shall be bound to do so; and for any wilful neglect to obey such order, or for any misconduct while attending such jury, by which the rights or remedies of any party to such proceeding shall be impaired or prejudiced, such sheriff, constable or other officer shall be liable to be fined by the officer before whom such jury shall have appeared, in a sum not exceeding twenty-five dollars.¹

§ 672. Upon such fine being imposed, notice thereof shall be given to the person fined, to the end that he may render an excuse to the officer imposing the same, or show cause why such fine should be remitted.² If no such excuse be rendered, or cause shown within thirty days after service of such notice, and such fine shall not have been remitted by the officer imposing the same, such officer shall make a special return of the delinquency or misconduct for which such fine was imposed, with the amount thereof, to the next county court of the county in which such delinquent shall reside.³ And the clerk of the court to which such return shall be made, shall deliver a copy thereof to the district attorney of the county, with copies of the minutes of fines imposed by such court, and in the same manner; which shall be collected, and may be remitted or mitigated in the same manner as fines imposed by courts of record, upon defaulting jurors.⁴

6. PROCEEDINGS IN CASES OF INSOLVENTS.

§ 673. Where any creditor shall demand of the court or officer before whom an insolvent is applying for a discharge from his debts, or to be discharged from imprisonment, that the case of such insolvent be heard and determined by a jury, it shall be the duty of the court before which such hearing is had, to cause a jury to be drawn in the same manner as for the trial of civil causes, from the jurors summoned and attending such court. If such demand be made to any single officer, he shall nominate eighteen reputable freeholders of the county, and shall issue a summons to the sheriff or any constable of the county, commanding him to cause the persons so nominated, to appear before such officer, at the time and place to be specified in the summons, not less than six nor more than twelve days,

¹ 3 R. S. 865, § 5.

² 3 R. S. 866, § 6.

³ 3 R. S. 866, § 7.

⁴ 3 R. S. 866, § 8.

and he shall summon them as in the case of jurors duly drawn for courts of record.¹

§ 674. Whenever the trustees of an insolvent shall show by their own oath or other competent proof, to the satisfaction of any justice of the supreme court, county judge, recorder of any city, and if in the city of Schenectady, the mayor thereof, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in the said trustees; or that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as required by statute, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such officer or judge shall issue a warrant commanding any sheriff or constable to cause such debtor, his wife or other person to be brought before him at such time and place as he shall appoint, for the purpose of being examined.²

§ 675. If any person so brought before such officer shall refuse to be sworn, or to answer satisfactorily, all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such officer, the said officer shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn, or to answer as required, or to sign such examination; in which warrant the particular default of the person committed shall be specified; and if it be in not answering any question, such question shall also be specified therein.³

§ 676. If any person so committed shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall recommit such person, unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer an oath, the questions so put to him.⁴

§ 677. Any sheriff or jailer wilfully suffering any person so committed or recommitted, pursuant to the foregoing sections, to escape, shall be liable to indictment for a misdemeanor; and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.⁵

¹ 3 R. S. 95, §§ 19, 20; Id. 104, § 6.

⁴ 3 R. S. 117, § 17.

² 3 R. S. 117, § 14.

⁵ 3 R. S. 118, § 18.

³ 3 R. S. 117, § 16.

7. SUMMONING JURORS UNDER A WRIT DE LUNATICO INQUIRENDO.

§ 678. The sheriff to whom a precept of the commissioners appointed to execute a writ de lunatico inquirendo, or writ in the nature of a writ de lunatico inquirendo, shall execute the same by summoning not less than twelve, nor more than twenty-four legally qualified jurors of his county, to appear at the time and place of hearing designated in such precept. The sheriff himself, selects the jurors, and neither the commissioners nor any one else have any right to make out a list of jurors to be served. The mode of service is the same as in all other cases where the sheriff selects the jurors. It must be personal, and the officer should state to each one served, the time and place at which he is required to attend, and the purpose for which he is so required to attend, and they should be summoned a reasonable time before the day of hearing. The sheriff must insert the names of the jurors so summoned by him, in a panel, and annex it to the precept, and make return upon the precept of the manner in which he executed the same. The sheriff may, at the time of the hearing, be required by the commissioners to attend upon the jury, and to guard the room in which they deliberate, from intrusion, but it will be irregular if he is present with them when they deliberate.¹

8. SUMMONING JURORS IN PLANK ROAD CASES.

§ 679. When a jury shall be necessary to ascertain the compensation and damages to the owner thereof, where land is taken for a plank road, the county judge of the county, before whom the proceedings is had, shall issue his precept directed to the sheriff of such county, either of his deputies, or any constable of such county, to summon the jurors drawn by the said judge, to attend at the time and place therein specified, to ascertain such compensation and damages. Every juror named in any such precept, shall, at least four days before the day therein specified for his attendance, be summoned personally, or by leaving at his residence a notice containing the substance of such precept. The officer serving such precept, shall return it to the said judge, with an affidavit of the manner of serving the same, and of the distance necessarily travelled by him for that purpose; and such officer shall receive for making such service, six cents a mile for the distance so travelled.²

9. WARRANT FOR THE DELIVERY OF OFFICIAL BOOKS AND PAPERS.

§ 680. Where an officer whose term of office has expired, or who has been removed therefrom, refuses to deliver over the books and

¹ 2 Hoff. Ch. Pr. 255.² 2 R. S. 495 §§ 80, 81.

papers pertaining to the office, to his successor; or the officer dies, and such books and papers come into the possession of any other person, who refuses to give them up to the successor in office, a justice of the supreme court, or the county judge of the county where such person so refusing resides, on proper proof of such refusal, shall commit such person so withholding, to the jail of the county, there to remain, until he shall deliver such books and papers or be otherwise discharged according to law. And such officer may also deliver his warrant directed to any sheriff or constable, commanding him in the day time to search such places as shall be designated in such warrant for such books and papers, and to seize and bring them before the officer issuing the writ.¹ The duties of the officer under such search warrant will be the same as under search warrants for stolen or embezzled property. The warrant will authorize the officer to break open any outer or inner doors necessary to execute the warrant, upon a demand that they be opened, and refusal.²

10. WARRANT TO DELIVER POSSESSION OF CANAL PREMISES, BOOKS AND PAPERS.

§ 681. It shall be the duty of every agent, toll collector, lock-keeper or superintendent employed on any canal and occupying any house, office, building or land belonging thereto, who shall be discharged from his employment; and of the wife and family of every such person, who shall die in such employment, to deliver up the premises so occupied and of all books, papers, matters or things belonging to the canals, acquired by virtue of his office, within seven days after a notice shall have been served for that purpose, by the acting canal commissioner. And in case of refusal or neglect to make such delivery, in either of the above cases, it shall be the duty of any justice of the peace, in the county where such premises shall be situated, upon application, to issue his warrant under his hand and seal, ordering any constable or other peace officer, with such assistance as may be necessary, to enter upon the premises so occupied, in the day time, and remove therefrom all persons found in possession thereof, and to take into his custody all books, papers, matters and things there found, belonging to the canals, and to deliver the same to the acting canal commissioner, or his authorized agent; and the officer to whom such warrant shall be delivered, shall execute the same according to its purport.³ The duties of the officer under such process will be similar to those of the sheriff under a writ of possession,⁴ and under the warrant for the delivery of official books and papers in other cases.⁵

¹ 1 R. S. 416, §§ 62-68.

² Ante §§ 79, &c.

³ 1 R. S. 638, §§ 343, 344.

⁴ Ante, §§ 571, &c.

⁵ Ante, § 680.

11. FORCIBLE ENTRIES AND DETAINERS. *a*

§ 682. Every justice of the supreme court, county judge, mayor, recorder, alderman of any city, and special justice, any justice of the marine court, and any justice of the justice's court of the city of New York, in their respective cities and counties, are declared to possess the like power and authority, respecting forcible entries and detainers.¹

§ 683. On complaint to any such officer, that any one has forcibly entered upon, or holds the possessions of any lands by force, contrary to the statute, he shall thereupon issue a precept to the sheriff or any constable of the county, commanding him to cause twenty-four inhabitants of the same county, duly qualified to serve as jurors, to come before such judge, at some time not less than two days thereafter, to inquire of such forcible entry, or such forcible holding.²

§ 684. The jurors must be notified personally, at least twenty-four hours before the time required for the hearing,³ and they shall be summoned, returned and impannelled in the same manner as provided by law in civil actions before justices of the peace, and shall be sworn by such judge, well and truly to hear, try and determine the traverse; they shall be kept together by such judge, and shall hear and examine any competent witnesses who may be offered, on oath, to be administered by such judge; and after hearing the allegations and proofs of the parties, the jury shall be kept together until they agree on a verdict, by an officer who shall be sworn, as is usual on trials in courts of record.⁴

§ 685. If the sheriff or constable be required by the county judge issuing such precept, to serve the notice required by the statute to be served, of the issuing of such precept, and of the time and place of the return thereof, on the party against whom the complaint is made, he shall do so, by delivering the same to such person; or if he cannot be found by delivering such notice to some person of proper age on the premises; or if there be no such person, by affixing the same on the front door of the house, if there be one; or if there be none, on some other public and suitable place on the premises.⁵

¹ 3 R. S. 831, § 1, &c.

⁴ 3 R. S. 832, § 9.

² 3 R. S. 831, § 3.

⁵ 3 R. S. 831, § 4.

³ 3 R. S. 833, § 16.

a Ala.—R. C. 1867, § 3297.

Mass.—St. 1860, p. 707.

Ark.—Dig. 1858, p. 541.

Mich.—St. 1857, p. 1322.

Cal.—Dig. 1860, p. 467; Laws 1865, p. 768.

Minn.—Rev. 1866, p. 571.

Conn.—Rev. 1866, p. 64.

Neb.—R. S. 574.

Fa.—Dig. 1847, p. 391; Laws 1863, p. 24.

N. J.—Dig. 1858, p. 298.

N. C.—Rev. Code, 296.

On.—Gen. L. 743.

Ill. 1 St. 521; Laws 1865, p. 107.

R. I.—R. S. 515.

Kan.—Gen. St. 1868, p. 809.

Tenn.—Code, p. 619.

Me.—R. S. 581.

Vt.—Gen. St. 1863 p. 357.

§ 686. If the jury shall find the defendant guilty, the said judge shall award restitution of the premises so forcibly entered, or forcibly held out, and shall assess the costs and expenses of the proceedings, and issue his precept reciting the proceedings before him, and commanding the sheriff of the county, or any constable thereof, to cause the complainant to be restored and put into full possession of the said premises, according as he was seized or possessed thereof before such entry; and shall also in the same precept, or in separate execution, direct the costs and expenses so assessed, to be levied and collected of the defendant, in the same manner as costs are or may be collected on judgments before justices of the peace in personal actions.¹ The sheriff or constable to whom any such process issued by such officer, shall be directed and delivered, shall execute the same, and if need be, shall command and take the power of the county for that purpose.²

§ 687. Upon a removal of such proceedings by certiorari, the supreme court may award restitution, with costs. And so upon the conviction of a defendant upon any indictment for forcible entry or forcible detainer found in any court of sessions or in any court of oyer and terminer, such court may award restitution in the same manner as a judge upon a verdict rendered as hereinbefore mentioned.³

12. SUMMARY PROCEEDINGS TO OBTAIN POSSESSION OF LANDS.

§ 688. Any tenant or lessee at will, or at sufferance, for any part of a year, or for one or more years, of any houses, lands, or tenements, and the assigns, under tenants, or legal representatives, of such tenant or lessee, may be removed from such premises, by any judge of the county courts of the county, or by any justice of the peace of the city or town where the premises are situated, or by any mayor or recorder of the city where such premises are situated, or in the city of New York, by the mayor, recorder, any justice of the marine court, or any one of the justices of the justice's courts of the city of New York, in the manner hereafter prescribed, in the following cases:

1. Where such person shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of the landlord;

2. Where such person shall hold over without such permission as aforesaid, after any default in the payment of rent, pursuant to the agreement under which such premises are held, and a demand of such rent shall have been made, or three days notice in writing, requiring the payment of such rent, or the possession of the premises, shall have

¹ 3 R. S. 833, §§ 12, 13, 14.

² 3 R. S. 833, § 15.

³ 3 R. S. 834, §§ 22, 23.

been served by the person entitled to such rent, on the person owing the same, in the manner prescribed for the service of the summons as hereinafter mentioned ;

3. Where the tenant or lessee of a term of three years, or less, shall have taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment during such term ;

4. Where any person shall hold over and continue in possession of any real estate which shall have been sold by virtue of an execution against such person, after a title under such sale shall have been perfected.¹

§ 689. On receiving a proper affidavit of the facts which according to the preceding section authorize the removal of a tenant, such officer shall issue his summons, describing the premises of which the possession is claimed, and requiring any person in the possession of said premises, or claiming the possession thereof, forthwith to remove from the same, or show cause before the said magistrate, within such time as shall appear reasonable, not less than three nor more than five days, why possession of said premises should not be delivered to such applicant ; provided, however, that in the cases where a person continues in the possession of the demised premises, after the expiration of his term, without permission of his landlord, the magistrate may direct such summons to be made returnable on the same day.²

§ 690. The summons shall be served, either,

1. By delivering to the tenant to whom it shall be directed, a true copy thereof, and at the same time showing him the original ; or,

2. If such tenant be absent from his last place of residence, and such place is in the city or town in which the demised premises are situated, by leaving a copy thereof at such place with some person of mature age residing on the premises ; or,

3. If no such person can be found at such place, or if such place is not in the city or town with the demised premises, by leaving a copy thereof on the demised premises with some person of mature age residing thereon ; or, if there be no such person residing thereon, with some person of mature age connected with the demised premises by employment in any business for which the premises are used ; or, if no person residing or employed on the demised premises can be found thereon, that such service may be made by affixing such copy upon a conspicuous part of said demised premises. If the summons be returnable on the day on which it is issued, it shall be served at

¹ 3 R. S. 836, § 28.

² 3 R. S. 836, § 30 ; 24 Barb. 438, Deuel v. Rust.

least two hours before the hour at which it is made returnable, and if not returnable on the same day it shall be served at least two days before the day on which it is made returnable. The proof of the service of the summons shall state particularly the exact time, place and manner of service, including the name of the person on which the same was made if it can be ascertained.¹

§ 691. Any person in possession of such demised premises, and any person claiming possession thereof, may at the time appointed in such summons, for showing cause, or before, file an affidavit with the magistrate who issued the same, denying the facts upon which the said summons was issued, or any of those facts; and the matters thus controverted shall be tried by a jury, provided either party to such proceeding shall, at the time appointed in such summons for showing cause, (and before adjournment,) demand such jury, and shall, at the time of such demand, pay the necessary costs and expenses of obtaining such jury.²

§ 692. In order to form such jury, the magistrate with whom such affidavit shall be filed, shall nominate twelve reputable persons, qualified to serve as jurors in courts of record, and shall issue his precept, directed to the sheriff, or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the persons so nominated to appear before such magistrate at such time and place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference.³ If more than the prescribed number of jurors are summoned, the proceedings will be reversed.⁴

§ 693. Six of the persons so summoned, shall be drawn in like manner as jurors in justice's courts, and shall be sworn by such magistrate, well and truly to hear, try and determine the matters in difference between the parties. Whenever a sufficient number of jurors, duly drawn and summoned, do not appear or cannot be obtained to form a jury, the magistrate may order any sheriff, constable or marshal to summon from the bystanders, or from the county at large, so many persons qualified to serve as jurors as shall be sufficient, and return their names to the magistrate. If the persons summoned do not attend, unless excused by the magistrate, they shall be subject to fine by him in the same manner as is now provided by law in the case of jurors in courts of record.⁵

¹ 3 R. S. 837, § 32; Laws 1863, Ch. 828; 4 Keyes 59, *The People ex rel. Clute v. Boardman*; 43 Barb. 116, *The People ex rel. Simpson v. Platt*; 1 Hill, 512, *Cameron v. McDonald*.

² 3 R. S. 837, § 34.

³ 3 R. S. 837, § 35.

⁴ 20 Wend. 207, *Farrington v. Morgan*.

⁵ 3 R. S. 838, § 36; 4 R. S. 660, § 1.

§ 694. After hearing the proofs and allegations of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the magistrate for that purpose, who shall be sworn to keep such jury as is usual in like cases in courts of record.¹

§ 695. If, at the time appointed in the summons, no sufficient cause be shown to the contrary, and due proof of the service of such summons be made to such magistrate; or if the verdict of any jury so summoned, shall be in favor of the lessor or landlord, or other person claiming the possession of the premises, the magistrate shall issue his warrant to the sheriff of the county, or to any constable or marshal of the city or town where the premises are situated, commanding such officer to put such landlord, lessor or other person into full possession of the premises; and the officer to whom such warrant is delivered, shall execute the same accordingly.² Under such warrant the officer shall have the same powers as on the execution of a writ of possession.³

13. COLLECTION OF FINES.

§ 696. When any court has made an order that any grand or petit juror shall show cause on the first day of the then next term of said court, why a fine should not be imposed on him; the clerk of the court shall immediately deliver to the sheriff of the county a copy of every such order, and such sheriff shall serve such order on the defaulting juror named therein personally; and shall return such order, and his proceedings thereon, to the court and at the time at which such juror shall be required to show cause.⁴

§ 697. When a fine shall be imposed by any court of law upon any grand or petit juror, or upon any constable, for nonattendance, or for any other cause, or upon any officer of such court, or upon any other person, without being accompanied by an order for the immediate commitment of the person so fined until such fine be paid, it shall be the duty of the clerk of such court immediately to deliver a copy of the order imposing such fine, to the district attorney of the county in which such court shall be sitting.⁵

§ 698. The district attorney shall immediately after the adjournment of such court, issue process under the seal of the county court of the county, to the sheriff thereof, commanding him to collect of the several persons named in the schedule annexed to such process,

¹ 3 R. S. 838, § 37.

² 3 R. S. 837, §§ 38, 39, 40.

³ Ante, § 571.

⁴ 3 R. S. 785, §§ 14-18.

⁵ 3 R. S. 786, § 20.

the several sums affixed to their names respectively, in such schedule, and to pay over the same to the treasurer of the county; and that at the time of collecting the same, he notify such persons respectively, that if they have sufficient matter to show for remitting such fines, they may show the same to the county court of the county on the first day of the next term thereof.¹

§ 699. To such process shall be annexed a schedule, containing in separate columns,

- 1 The names of the persons fined
2. Their respective places of residence;
3. The amount of the fine imposed on each; and
4. The cause of such fine being imposed.

Which schedule shall be certified by the district attorney to contain a true abstract of the orders imposing such fines, delivered to him by the clerk.²

§ 700. The sheriff to whom such process shall be directed and delivered, shall proceed to collect the amount of such fines respectively, of the several persons named in such schedule, by a levy and sale of the personal property of such persons, in the manner provided by law, in the service of executions against property in civil cases, and shall be entitled to collect the same fees; and in case sufficient personal property cannot be found to raise such amount, such sheriff shall take the body of the person named in such schedule, and detain him in custody, until he shall satisfy the same, in the same manner as on executions against the body in civil cases, and shall be entitled for his services to the like fees.³ And he shall return the process at the then next term of the county court of his county, after such delivery, with his proceedings thereon; and such return may be compelled in the same manner as civil process.⁴

§ 701. After the expiration of ten days after the day appointed for the hearing excuses of defaulting jurors in the city of New York, the commissioner of jurors of said city shall issue a warrant directed to the sheriff of the said city and county, commanding him to collect of the several persons named in the schedule, to be annexed to such warrant, the several sums affixed to their names respectively in such schedule, and pay over the same to the treasurer of the county. The said schedule shall contain the names of the jurors fined, the respective places of residence and the amount of fines imposed on each. The said sheriff shall proceed to collect the amount of such fines

¹ 3 R. S. 786, § 21.

² 3 R. S. 786, 22.

³ 3 R. S. 787, 23.

⁴ 3 R. S. 787, § 24.

respectively of the several persons named in such schedule, by a levy and sale of such personal property of such persons, in the manner provided by law on the service of executions in civil cases, and shall be entitled to collect the same fees; and the said sheriff shall return the said warrant, with his proceedings thereon, to the said commissioner, within thirty days after the delivery thereof to him, and such return may be enforced in the supreme court in the same manner as the return of civil process; and such warrant may be renewed in like manner in cases where fines have not been paid or collected.¹

§ 702. Each officer in the several counties of this state who shall receive any money on account of any fine or penalty or other matter, in which his county or any town or city therein shall have an interest, shall make a report in writing every year bearing date the first day of November in which he shall state particularly the time when and the name of the person or persons from whom such money has been received, and also the amount and on what account the same has been received, which report shall include all receipts of moneys before mentioned, that he has received during the year next preceding the date of his report, which report shall be made to the board of supervisors of his county, duly verified by oath, and filed with the clerk of the said board, on or before the fifth of November in each year. And such officer shall within ninety days after the receipt of any such money, pay the whole amount so received, without any deduction, for costs or charges in collecting the same, to the treasurer of his county, who shall give to such person duplicate receipts therefor, one of which receipts shall be attached to his said annual report. And it is made the duty of the district attorney of the several counties to sue for and recover in the name of his county, any such moneys and not paid as above provided. And neglect to pay over any such moneys is declared a misdemeanor.²

14. COUNTY TREASURER'S WARRANT AGAINST COLLECTORS.

703. If any collector shall refuse or neglect to pay to the several town officers of his town, or to the county treasurer, the sums required by his warrant to be paid to them respectively, or either of them, or to account for the same as unpaid, the county treasurer shall within twenty days after the time when such payments ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid and unaccounted for by such collector, and all costs and fees for collecting,³ of the goods and chattels, lands and tenements of such

¹ 3 R. S. 699, § 23.

³ 4 R. S. 574, §§ 1, 2.

² 4 R. S. 599, §§ 1, 2, 3, 5.

collector, and to pay the same to the county treasurer, and return such warrant within forty days after the date thereof; which warrant the county treasurer shall immediately deliver to the sheriff of the county; but no such warrant shall be issued by the county treasurer for the collection of moneys payable to town officers, without proof, by the oath of such town officers, of the refusal or neglect of the collector to pay the same, or account therefor, as above provided.¹

§ 704. The sheriff to whom such warrant is directed, shall immediately cause the same to be executed, and shall make return thereof to the county treasurer, within the time therein specified, and shall pay to him the moneys levied by virtue thereon, deducting for his fees the same compensation that the collector would have been entitled to retain. Such part of the moneys collected, if any, as ought to have been paid by the collector to town officers, shall be paid by the county treasurer to the officers to whom the collector was directed to pay the same; but if the whole amount of moneys due from the collector shall not be collected in such warrant, the county treasurer shall first retain the amount which ought to have been paid to him, before making any payment to the town officers.²

§ 705. If the whole sum due from the collector shall be collected, the sheriff shall so state in his return; but if a part only, or if no part of such sum shall be collected, the sheriff shall state in his return the amount levied, if any, exclusive of his fees, and shall also certify that such collector has no goods or chattels, lands or tenements, in his county, from which the moneys or the residue thereof, as the case may be, could be levied; and in either case, the county treasurer shall forthwith give notice to the supervisor of the town or ward, of the amount due from such collector.³

§ 706. If any sheriff shall neglect to return any such warrant, or to pay the money levied thereon, within the time limited for the return of such warrant; or shall make any other return than such as above mentioned, the county treasurer shall forthwith proceed to collect by attachment, the whole sum directed to be levied by such warrant.⁴ Such proceeding by attachment shall be in the supreme court, in the same manner and with the like effect, as for neglecting to return any execution in a civil suit; and the proceedings thereon shall be the same in all respects.⁵ In case of failure to collect by attachment, the attorney general shall proceed upon the sheriff's bond.

¹ 1 R. S. 922, § 26.

² 1 R. S. 923, § 28.

³ 1 R. S. 923, § 29.

⁴ 1 R. S. 923, § 31.

⁵ 3 R. S. 870, § 34.

⁶ 1 R. S. 923, § 33.

15. WARRANTS TO COLLECT UNPAID TAXES.

§ 707. When it shall appear by the return of any collector, made according to law, to a county treasurer, that any tax imposed under the provisions of the act concerning taxes upon rents reserved on certain leases, remains unpaid, such county treasurer shall issue his warrant to the sheriff of any county where any real or personal estate of the person upon whom such tax is imposed, may be found, commanding him to make of the goods and chattels, and real estate of such persons, the amount of such tax, together with one dollar for the expense of issuing such warrant, and to return the said warrant to the treasurer issuing the same, and to pay to him the money which shall be collected by virtue thereof, by a certain time therein to be specified, not less than sixty days from the date of such warrant.¹

§ 708. Such warrant shall be a lien upon and shall bind the real and personal estate of the person against whom the same shall be issued from the time an actual levy shall be made by virtue thereof; and the sheriff to whom such warrant shall be directed, shall proceed upon the same in all respects with the like effect, and in the same manner as prescribed by law, in respect to executions against property issued by a county clerk, upon judgments rendered by a justice of the peace, and shall be entitled to the same fees for his services in executing the same, to be collected in the same manner.²

§ 709. In case of the neglect of any sheriff to return such warrant according to the directions therein, or to pay over any money collected by him in pursuance thereof, he shall be proceeded against in the supreme court by attachment, in the same manner, and with the like effect, as for similar neglects in reference to an execution issued out of the supreme court in a civil suit, and the proceedings thereon shall be the same in all respects.³

§ 710. When it shall appear by the return of any collector, made according to law to a county treasurer, that any tax imposed on a debt owing to a person not residing in the United States, remains unpaid, such county treasurer shall, after the expiration of twenty days from the return of such collector, issue his warrant to the sheriff of any county in this state, where any debtor of such nonresident creditor may reside, commanding him to make of the goods and chattels and real estate of such nonresident, the amount of such tax, to be specified in a schedule annexed to the said warrant, together with his fees and the sum of one dollar for the expense of issuing such warrant, and to

¹ 1 R. S. 940, § 132

³ 1 R. S. 941, § 134.

² 1 R. S. 941, § 133

return the said warrant to the treasurer issuing the same, and to pay over to him the money which shall be collected by virtue thereof, except the said sheriff's fees by a certain day therein to be specified, within sixty days from the date of such warrant.¹

§ 711. The taxes upon several debts owing to the nonresident shall be included in one warrant, and the taxes upon several debts owing to different nonresidents may be included in the same warrant, and where several nonresidents are included in the same warrant, the sheriff shall be directed to levy the sums specified in the schedule thereto annexed, upon the personal and real property of the nonresidents, respectively, opposite to whose names, respectively, such sums shall be written, together with the sum of fifty cents upon each nonresident, for the expense of such warrant.²

§ 712. Such warrant shall be a lien upon, and shall bind the real and personal estate of the nonresident against whom the same shall be issued, from the time an actual levy shall be made upon any property by virtue thereof; and the sheriff to whom such warrant shall be directed, shall proceed upon the same, in all respects, with the like effect, and in the same manner as prescribed by law in respect to executions against property, issued upon judgments rendered in the supreme court, and shall be entitled to the same fees for his services in executing the same, to be collected in the same manner.³

§ 713. In case of the neglect of any sheriff, to return such warrant according to the direction therein, or to pay over any money collected by him in pursuance thereof, he shall be proceeded against in the supreme court by attachment, in the same manner and with like effect as for similar neglects in reference to an execution issued out of the supreme court in a civil suit, and the proceedings thereon shall be the same in all respects.⁴

§ 714. Special provision is made in the charters of several of the cities and towns of the state, for the collection of unpaid taxes by the sheriff of the county, or the marshals, or constables of such cities or towns respectively. The duties of the officers to whom such warrants are directed and delivered for execution, and the form of proceeding thereunder, are pointed out in such charters, and are peculiar to each particular place. For this reason, as well as that they are liable to be varied with every change in such charters, it has not been thought proper to occupy space with the form of proceedings in such cases, as each officer who is called upon to act will have the statute under which he is so authorized to act, before him. It has been held that a

¹ 1 R. S. 942, § 141.

² 1 R. S. 942, § 142

³ 1 R. S. 943, § 143.

⁴ 1 R. S. 943, § 144.

warrant in due form, issued to a constable by the receiver of taxes in the city of New York, for the collection of a tax, protects the officer executing it, whether the tax was legally assessed or not.¹

§ 715. Whenever it shall satisfactorily appear to the county treasurer of any county, that any state or county tax legally assessed within his county, (not assessed on real estate of nonresidents,) cannot be collected by reason of the removal of the person so assessed to any other county of this state, it shall be lawful for the said treasurer to issue a warrant under his hand and seal, and certified by the clerk of the county that he is such treasurer, to any constable or sheriff of the county where such person resides to collect the same out of the personal property of such person.² And any sheriff or constable receiving such warrant shall execute the same, and make the like returns and be entitled to the same fees, and subject to the same liabilities and penalties for neglect, as upon executions from any court.³

16. NOTIFICATIONS AND WARRANTS OF THE COMPTROLLER.

§ 716. Whenever the comptroller shall deem it expedient, he shall issue a notification, in the name of the people of this state, to any person who shall have received moneys belonging to the state, for which he shall not have accounted. In case of the death of such person, the notification shall be directed to his legal representatives.⁴ Such notification shall be served by the sheriff of the county where the person to whom the same shall be directed, shall reside, by delivering a copy thereof to him, or by leaving such copy at his usual place of abode, at least forty days before the time limited in the notification for rendering such accounts and vouchers. The return of such notification to the comptroller's office, with the certificate of the sheriff indorsed thereon, that the service has been made by delivering a copy of the notification to such person, or by leaving such copy at his usual place of abode, shall be conclusive evidence of the proceedings.⁵

§ 717. If any collector of tolls shall neglect to deposit according to law, and the directions of the comptroller, the moneys that from the abstracts of returns made to the comptroller, he shall appear to have collected for tolls, the comptroller may issue a warrant, under his hand and seal, directed to the sheriff of any county where such collector or any of his sureties may be found, thereby commanding such sheriff to cause the amount of the tolls in the hands of such collector, (or such part thereof as the comptroller shall direct by warrant,) to be made and levied of the goods and chattels, lands and tenements of

¹ 1 Seld. 376, *Chegaray v. Jenkins*.

² 1 R. S. 921, § 21.

³ 1 R. S. 921, § 23.

⁴ 1 R. S. 481, § 27.

⁵ 1 R. S. 481, § 29, 30.

such collector; and in case the same shall not be sufficient, then of the goods and chattels, lands and tenements of the sureties of such collector; and to return the money, together with the warrant and his doings thereon, to the comptroller, within sixty days from the date thereof. The sheriff to whom such warrant shall be directed, shall immediately cause the same to be executed, in the same manner as in civil cases; and may demand and collect the same fees for executing the same, as are allowed by law for the service of executions issuing out of the supreme court.¹

§ 718. Whenever any sheriff shall have neglected to return any warrant issued by the comptroller against any collector of canal tolls, or shall have made any other return than that required by law, he shall be proceeded against in the supreme court, by attachment for neglect, in the same manner and with the like effect, as for neglect to return any execution in a civil suit; and the proceedings thereon shall be the same in all respects.²

17. THEIR DUTIES CONCERNING STATE LANDS.

§ 719. If any person, under pretence of any claim inconsistent with the sovereignty and jurisdiction of this state, shall intrude upon any of the waste or ungranted lands of this state, it shall be the duty of the district attorney of the county, immediately to report the same to the governor, who shall thereupon, by a written order, direct the sheriff of the county to remove from said lands the person so intruding; and the sheriff shall execute such order; and in case of resistance made or threatened, he may call to his aid the power of the county, as in cases of resistance to the writs of the people.³

§ 720. Whenever the commissioners of the land office shall direct a resale of lands pursuant to the statute, they shall cause notice to be given to every occupant of such land to remove therefrom; and in case of his refusal or neglect to comply with such notice, they shall direct the district attorney of the county in which such lands may be situated, to enter a complaint against such occupant, before the county judge of the county. The judge shall proceed to examine into the matter; and on proof, by the production of a certificate from the clerk of the commissioners of the land office, that a resale of such land has been duly ordered, for default of payment, he shall issue his warrant to the sheriff of the county, commanding him, within ten days after the receipt thereof, to remove such occupant from such lands; and it shall be the duty of the sheriff, within the time specified in the warrant,

¹ 1 R. S. 620, §§ 230, 231.

² 3 R. S. 870, § 34.

³ 1 R. S. 84, §§ 4, 5.

to remove such person, and for that purpose he shall have the same powers as in the execution of criminal process. The sheriff shall retain such warrant in his hands, and if any person so removed shall return, to settle or reside upon such lands, without the consent of the state engineer and surveyor, such person shall forthwith be removed by the sheriff, pursuant to the warrant; and shall also be deemed guilty of a misdemeanor, and be liable, on conviction, to be fined or imprisoned; the fine not to exceed one hundred dollars, and the imprisonment not to exceed thirty days. Every judge who may issue such warrant, for the issuing such warrant and taking the preliminary proof, shall be entitled to receive a fee of one dollar in each case; and the sheriff for executing every such warrant, shall be allowed such compensation as the comptroller shall certify to be reasonable; which fees shall be paid out of the treasury.¹

§ 721. The commissioners of the land office may require the sheriff of any county, in which lands belonging to the people of this state for which patents shall not have been issued, or any Indian lands, may be situated, to examine and report to them, and to the district attorney of his county, any trespasses that may be committed on such lands, by cutting or carrying away the timber thereon.²

18. DISTRAINING INANIMATE PROPERTY.

§ 722. When any person shall be authorized by law to distrain any inanimate goods or chattels doing damage, he shall keep the same in some safe and convenient place, until the damages shall be appraised, and the goods be sold or otherwise disposed of.³

§ 723. He shall apply to any two fence viewers of the town, to appraise the damages sustained by him; who shall proceed therein, in the same manner and with the same powers, as in respect to cattle doing damage; and in addition, they shall estimate and certify the value of the property distrained.⁴

§ 724. The distrainer shall affix a notice in three public places of the town, for ten days, as follows:

1. Specifying therein the property distrained, and the amount of damages certified;
2. Requiring the owner of such property to redeem and remove the same, before the day therein appointed for the sale thereof;
3. Stating that such property will, on some day, at least ten days from the day of the first posting thereof be sold to pay such damages and the costs and charges of the proceedings.⁵

¹ 1 R. S. 550, §§ 65-68.

² 1 R. S. 553, § 90.

³ 3 R. S. 842, § 8.

⁴ 3 R. S. 842, § 9.

3 R. S. 842, § 10

§ 725. If the value of the property distrained, as certified by the appraisers, exceed fifty dollars, the distrainer shall publish a notice in the nearest newspaper, once in each week, for four weeks, similar to that required in the last section, except that the time of sale shall be at least thirty days from the day of the first publication of such notice.¹

§ 726. If the owner of such property be known to the distrainer, or if any person be known to him as claiming any interest in such property, and if such owner or person reside within the county, the distrainer shall also serve a copy of such notice, within two days after the time of posting, or after the first day of the publication thereof, either personally on such owner or person, or in case of his absence from his usual or last place of residence, by leaving the same at such residence, with a proper person.²

§ 727. If such goods and chattels be not removed, and if the damages so certified, with the fees of the appraisers and the expenses of such notice, be not paid, at the time appointed in such notice for the sale, the distrainer shall apply to the sheriff of the county, or one of his deputies, or to any constable of the town, to sell such goods and chattels, and shall make and deliver to such officer, an affidavit showing his compliance with the foregoing provisions, and the original certificate of the appraisers.³

§ 728. If such affidavit and certificate are in due form, and show a compliance with the provisions of the statute, such officer shall proceed and sell the goods and chattels so distrained, in the same manner as on executions against personal property in civil cases, and with the like authority and effect, and shall be entitled to the same fees for his services.⁴

§ 729. From the proceeds of such sale, such officer shall retain his own fees, and shall pay to the distrainer the amount of the damages so certified, and the expenses of such notices, and also all expenses that may have been necessarily incurred in the safe keeping and preservation of such property; which expenses shall be ascertained and certified by any judge of the county courts, or by a justice of the peace of the county.⁵

§ 730. If any balance shall remain, such officer shall pay the same to the county treasurer, for the use of the owner of such property, or his legal representatives.⁶

§ 731. When, by the provisions of any statute, any officer is author-

¹ 3 R. S. 842, § 11.

² 3 R. S. 843, § 12.

³ 3 R. S. 843, § 13.

⁴ 3 R. S. 843, § 14.

⁵ 3 R. S. 843, § 15.

⁶ 3 R. S. 843, § 16.

zed to distrain on any property, for any purpose whatever, and no special provisions shall otherwise be made, he shall cause at least five days notice of sale of such property to be given by posting the same in three public places of the town, where such sale shall be made.¹

§ 732. Before making any such sale, such officer shall also cause the property distrained, to be appraised by three disinterested freeholders of the town, on oath; and such appraisal, with an inventory of the property distrained, shall be certified by the appraisers in writing.²

§ 733. Within ten days after any such sale, the officer making the same shall file in the office of the clerk of the town or city where such sale was made,

1. His own affidavit, specifying the cause of such distress, and the amount of the penalty, tax, duty or other sum, for which the same was made;

2. Proof, by affidavit, of the notice herein required, having been given;

3. The inventory and certificate of the appraisers;

Which papers, when so filed, shall be presumptive evidence of the facts therein contained. And unless the foregoing provisions are complied with, within the time required, such officer shall forfeit to the owner of the property sold, twenty-five dollars.³

§ 734. From the proceeds of such sale, such officer shall be authorized to deduct and retain the expenses of such appraisal, certificate, notice, proof and affidavits, and of the filing of the same, as herein required. And the residue of such proceeds, after satisfying the penalty, tax, duty or other sum, for which such sale was made, shall be paid within ten days after such sale, to the treasurer of the county, for the use of the owners of such property.⁴

§ 735. The cases in which the foregoing provisions apply, are not very clearly defined. The statute itself refers them to those cases where no special provision shall otherwise be made. The revisors in their notes say, that there are various cases where officers are allowed summarily to distrain on property, as for the collection of canal tolls and penalties.⁵ It has however been determined that the foregoing provisions do not apply to a collector of a district school tax, and that he is not liable to the foregoing penalty, for neglect to file the evidences of his proceedings.⁶

¹ 3 R. S. 844, § 20.

² 3 R. S. 844, § 21.

³ 3 R. S. 844, §§ 22, 23.

⁴ 3 R. S. 844, § 24.

⁵ 3 R. S. 767, 2d ed.

⁶ 4 Barb. 246, *Pangburn v. Smith*.

19. WRECKS.

§ 736. The sheriff, coroners and wreck masters of every county in which any wrecked property shall be found when no owner or other person entitled to the possession of such property shall appear, shall severally have power and it shall be their duty to pursue all necessary measures for saving and securing such property; to take possession thereof, in whose hands soever the same may be, in the name of the people of this state; to cause the value thereof to be appraised by indifferent persons; and to keep the same in some safe place to answer the claims of such persons as may thereafter appear entitled thereto.¹

§ 737. If the property so saved shall be in a perishable state, so as to render the sale thereof expedient, it shall be the duty of the officer in whose custody the same shall be, to apply to the county judge of the county, by a petition, supported by an affidavit of the facts, for an order authorizing such sale; and if the judge to whom such application shall be made, shall be satisfied that a sale of the property would be most beneficial to the parties interested, it shall be his duty to make the order so applied for.²

§ 738. If such order be made, the officer having custody of the property directed to be sold, shall sell the same at public auction, at the time and in the manner to be specified in the order, of which notice must be given as hereinafter mentioned; and the proceeds of such sale, deducting the expenses thereof, as the same shall be settled and allowed by the judge making the order, shall be paid to the treasurer of the county in which the property shall have been found.³

§ 739. If, within a year after such wrecked property shall have been found and saved, any person shall claim the same or the proceeds thereof, as owner or consignee, or as the agent of the owner or consignee, and shall establish his claim by evidence, which the county judge of the county shall deem satisfactory, it shall be the duty of such judge, on receiving the bond required to be given in such cases by such claimant, to make an order directing the officer, in whose possession such property, or the proceeds thereof shall be, to deliver or pay the same to the claimant, upon the payment by him of a reasonable salvage, and all necessary expenses incurred in the preservation and keeping of such property.⁴

§ 740. The rejection by the judge, to whom it may be exhibited, of any claim for wrecked property, shall not preclude the claimant

¹ 2 R. S. 961, § 2.

² 2 R. S. 961, § 3.

³ 2 R. S. 961, § 4.

⁴ 2 R. S. 961, §§ 5, 6.

from maintaining a suit for the recovery of such property or its proceeds, against the officer in whose hands the same shall be ; but if the plaintiff in any such suit shall prevail, there shall be deducted in addition to the salvage and expenses charged on the property, from the damages to be recovered, all the costs of the defendant in making his defence.¹

§ 741. It shall be the duty of every officer to whom any order duly made, for the delivery of wrecked property, or the payment of its proceeds, shall be directed, to present to the claimant exhibiting such order, a written statement of the claims for salvage, and expenses on such property and proceeds. If the claimant shall refuse to allow such claims, the amount of such salvage and expenses shall be adjusted in the manner hereinafter mentioned, and in all cases, after the payment or the tender of the payment of such salvage and expenses as agreed to, or adjusted, the officer in whose custody such property or proceeds shall be, shall deliver or pay the same, according to the terms of the order directed to him.²

§ 742. It shall be the duty of the wreck masters, in the several counties in which they shall be appointed, to give all possible aid and assistance to all vessels stranded on the coasts of their respective counties, and to the persons on board the same, and to use their utmost endeavors to save and preserve such vessels, and their cargoes, and all goods and merchandize which may be cast by the sea upon the land ; and in the performance of these duties they shall employ such and so many men as they may respectively think proper. And it shall be the duty of all magistrates, constables and citizens to aid and assist the wreck masters, when required, in the discharge of their duties.³

§ 743. All the sheriffs, coroners and wreck masters, and all persons employed by them, and all other persons aiding and assisting in the recovery and preservation of wrecked property, shall be entitled to a reasonable allowance as salvage for their services, and to all expenses incurred by them, in the performance of such services, out of the property saved ; and the officer having the custody of such property shall detain the same until such salvage and expenses shall be paid.⁴ It has been determined that a canal boat sunk in the Hudson, one hundred miles from the ocean, was not a wreck ;⁵ and that no person assisting in saving wrecked property, except the officer, had a lien thereon for salvage and expenses.⁶

§ 744. The whole salvage that shall be claimed in any case shall

¹ 2 R. S. 962, § 8.

⁴ 2 R. S. 962, § 12.

² 2 R. S. 962, § 9.

⁵ 7 Barb. 113, *Baker v. Hoag*.

³ 2 R. S. 962, §§ 10, 11.

⁶ 3 Barb. 208, *Baker v. Hoag*.

not exceed one-half the value of the property or proceeds on which such salvage shall be charged, and every agreement order or adjustment allowing a greater salvage shall be void.¹

§ 745. If in any case, the amount of salvage and expenses on property saved, shall not be settled by the agreement of the parties, the owner or consignee of such property, or the master or supercargo having charge thereof at the time the same was wrecked, or a claimant having an order for its delivery, may apply to any one of the judges of the county court of the county in which such property shall be, for the appointment of suitable persons as appraisers, to adjust and settle the amount of such salvage and expenses.²

§ 746. It shall be the duty of the judge to whom such application shall be made, by an order under his hand and seal, to appoint three disinterested freeholders, of the county, not inhabitants of the town in which the property shall have been saved, to adjust and settle such salvage and expenses.³

§ 747. The persons so appointed, before they shall enter upon the performance of their duties, shall be sworn to perform faithfully and impartially the duties of their trust, before any officer authorized to administer oaths. They shall have power to issue compulsory process for the attendance of witnesses, and to administer oaths to all witnesses who shall attend or be produced; and their decision, or that of any two of them under their hands, as to the amount of salvage and expenses that ought to be paid, and the sums to be paid to each person entitled to charge in such salvage, or claiming such expenses, shall be final and conclusive.⁴

§ 748. The fees and expenses of the appraisers shall be paid by the person on whose application they shall have been appointed, and shall be a charge on the property saved. Each appraiser shall be entitled to two dollars for each day's necessary attendance, and to a sum not exceeding one dollar for his daily expenses.⁵

§ 749. If within a year after the wrecked property shall have been saved, no person shall have appeared to claim the same, or if within three months after a claim shall have been preferred, the salvage and expenses on such property shall not have been paid, or a suit for the recovery of the property have been commenced, it shall be the duty of the officer in whose custody such property shall be, to sell the same at public auction, and to pay the proceeds of such sale, deducting salvage and expenses, into the treasury of this state for the ben-

¹ 2 R. S. 962, § 13.

² 2 R. S. 962, § 14.

³ 2 R. S. 963, § 15.

⁴ 2 R. S. 963, § 16.

⁵ 2 R. S. 963, § 17.

efit of the parties interested; but in no case shall any deduction of salvage and expenses be made, unless the amount thereof shall have been settled upon due proof, by an order of the county judge of the county in which the property shall have been saved, a copy of which order and of the evidence in support thereof shall be transmitted by the judge making it to the comptroller.¹

§ 750. The provisions of the preceding section shall be construed to apply to the proceeds of wrecked property, so far as relates to the time and manner of settling the salvage and expenses chargeable thereon. The balance of such proceeds, after the salvage and expenses as settled, shall have been deducted, shall be paid by the county treasurer into the treasury of this state.²

§ 751. Public notice of every sale to be made of wrecked property, under the foregoing provisions, shall be published by the officer making the sale, for at least two weeks in succession, in one or more of the newspapers printed in the city of New York. Every such notice shall state the time and place of the sale, and shall contain a particular description of the property intended to be sold.³

§ 752. Every sheriff, coroner or wreck master, into whose possession any wrecked property shall come, shall immediately thereafter publish a notice, directed to all parties interested, for at least four weeks in succession, in one or more of the newspapers printed in the city of New York.⁴ Every such notice shall contain a minute description of such wrecked property, and of every bale, bag, box, cask, piece or parcel thereof, and of the marks, brands, letters and figures on each, and shall state where such wrecked property then is, and its actual condition, and the name if known, of the vessel from which it was taken or cast on shore, and of the master and supercargo of such vessel, and the place where such vessel then is, and its actual condition. The expense of publishing every notice directed to be published, shall be charged on the property or proceeds to which such notice shall relate.⁵

§ 753. Every sheriff, coroner, wreck master or other officer, who shall detain in his hands any wrecked property, or the proceeds thereof, after the salvage and expenses chargeable thereon shall have been paid, or offered to be paid to him, or who shall be guilty of any fraud, embezzlement or extortion, in the discharge of his duties, or who shall in any manner violate the provisions of the statute relative to wrecks, shall forfeit treble damages to the party injured, and shall be deemed guilty of a misdemeanor.⁶

¹ 2 R. S. 963, § 18.

² 2 R. S. 963, § 19.

³ 2 R. S. 963, § 20.

⁴ 2 R. S. 963, § 21.

⁵ 2 R. S. 964, §§ 22, 23.

⁶ 2 R. S. 964, § 24.

§ 754. Every person who shall take away any goods from any stranded vessel, or any goods cast by the sea upon the land, or found in any bay or creek, or who shall knowingly have in his possession any goods so taken or found, and shall not deliver the same to the sheriff, or one of the coroners or wreck masters of the county where the same shall have been found, within forty-eight hours after the same shall have been taken by him, or have come into his possession, shall forfeit treble the value of the goods so taken or kept by him, to the owner or consignee thereof, and shall be deemed guilty of a misdemeanor, punishable by fine and imprisonment, or both, in the discretion of the court by which he shall be tried.¹

§ 755. Every person who shall deface or obliterate the marks on wrecked property, or in any manner disguise the appearance thereof, with intent to prevent the owner from discovering its identity, and any person who shall destroy or suppress any invoice, bill of lading or other document, tending to show the ownership of wrecked property, shall be deemed guilty of a misdemeanor, punishable by fine and imprisonment, the fine not to exceed two thousand dollars, the imprisonment three years.²

§ 756. It shall be the duty of all judges, sheriffs, justices of the peace, coroners, constables and wreck masters, to present all offences and offenders, against the provisions of title twelve of chapter twenty, of the first part of the Revised Statutes, hereinbefore set forth, that shall come to their knowledge within their respective counties, to the grand jury at the next court of sessions.³

20. THEIR POWERS AND DUTIES UNDER THE MILITARY CODE.

§ 757. In case of any breach of the peace, tumult, riot or resistance to process of this state, or imminent danger thereof, it shall be lawful for the sheriff of any county, or the mayor of any city, to call for aid upon the commandant of any division, brigade, regiment, battalion, troop, battery or company; and it shall be the duty of the commanding officer of the division, brigade, regiment, battalion, troop, battery or company upon whom such call is made, to order out in aid of the civil authorities, the military force, or any part thereof under his command.⁴ And it shall be the duty of the commanding officer of any division, brigade, regiment, battallion, troop, battery or company, in all cases when so called into service, to provide the men of his command, so ordered out, with a sufficiency of proper ammunition and arms in complete order for actual service,⁵ and such commanding

¹ 2 R. S. 964, § 25.

² 2 R. S. 964, § 26.

³ 2 R. S. 964, § 27.

⁴ Military Code 1870, § 242.

⁵ Id. § 243.

officer shall be subject, as provided by law, to the sheriff or public officer who shall so require his aid; and for refusing or neglecting to obey the order of such a public officer so requiring such service, or for interfering, or in any way hindering or preventing the men of his command from performing such duty, or in any manner by neglect or delay, preventing the due execution of law, every such commanding officer and every commissioned officer under his command so offending shall be liable to a fine of not less than one hundred nor more than five hundred dollars and imprisonment in the county jail not exceeding six months.¹ All officers, noncommissioned officers, musicians and privates of the national guard while on duty or assembled therefor, pursuant to the order of the sheriff of any county, or the mayor of any city, in cases of riot, tumult, breach of the peace, resistance to process, or whenever called upon in aid of the civil authorities, shall receive the compensation provided in the twenty-first section of the act entitled "an act to enforce the laws and preserve order," passed April the fifteenth, eighteen hundred and forty-five, and such compensation shall be audited and allowed, and paid by the supervisors of the county where such service is rendered, and shall be a portion of the county charge to be levied and raised as other county charges are levied and raised. And every person who shall be wounded or disabled in such service shall be taken care of and provided for at the expense of the county where such service shall be rendered.²

§ 758. The uniforms, arms and equipments required by law or regulations of every officer, non commissioned officer, marine and private of the national guard, shall be exempt from all suits distresses, executions or sales for debts, or for the payment of taxes; and every mounted officer, and every member of a troop of cavalry or battery of artillery who shall own a suitable horse necessary for his use as such officer or member, shall hold the same with the like exemption.³ And no person belonging to the military forces shall be arrested on any civil process while going to, remaining at, or returning from any place at which he may be required to attend for military duty.⁴

§ 759. For the purpose of collecting any fines or penalties imposed by any court martial authorized by the Military Code, the president of the court shall within fifteen days after the fines or penalties have been imposed and approved, make a list of the persons fined, describing them distinctly, and showing the sums imposed as fines or penalties on each person, and shall draw his warrant under his official

¹ Military Code 1870, § 244.

² Id. §§ 177, 247.

³ Military Code 1870, § 256.

⁴ Id. § 257.

signature, directed to any marshal of the court, or to the sheriff or constable of any city or county (as the case may be) thereby commanding him to levy such fines or penalties, together with the costs, on the goods and chattels of such delinquents, and in default of sufficient goods and chattels to satisfy the same, then to take the body of such delinquent and convey him to the common jail of such city or county, where the jailer shall keep the said delinquent closely confined, without bail or manprize for two days for any fine or penalty not exceeding ten dollars, and two additional days for every dollar above that sum, unless the fine or penalty, together with the costs and the jailer's fees, be sooner paid; but no such imprisonment shall extend beyond the period of twenty days; provided however that the prisoner may be liberated at any time by order of the commandant of the division or brigade to which he belongs. No property shall be exempt from the payment of such fines or penalties.¹ And every such marshal, sheriff or constable to whom such list and warrant shall be directed and delivered, is hereby authorized and required to execute the same by levying and collecting the fines and penalties within forty days from the receipt of such warrant, and make return thereof to the officer who issued the same. Any refusal or wilful neglect on the part of such marshal, sheriff or constable, to execute such warrant as herein required, shall subject the officer so offending to a fine double the amount specified in said warrant, and which said officer so refuses or neglects to collect, which said fine shall be prosecuted for by the president of such court against the officer so offending, and his surety, in any court in this state having jurisdiction in civil actions.² Any such warrant for the collection of fines shall and may be renewed in the same manner that executions issued from justices' courts may by law be renewed.³ The amount of any fines or penalties so collected from any officer, noncommissioned officer, musician or private of a regiment, battallion, troop, battery or company, shall be paid by the officer collecting the same into the county treasury within thirty days after the collection thereof, and shall form a portion of and be credited to, the regimental battallion or separate troop or battery fund of the regiment, battallion or separate troop or battery, to which the person so fined belonged. And the amount of fines or penalties so collected from any other commissioned officer shall be paid by the officer collecting the same to the treasurer of the state.⁴

§ 760. Each officer to whom a warrant for the collection of fines

¹ Military Code 1870, § 214.

² Id. § 215

³ Military Code 1870, § 216.

⁴ Id. §§ 217, 201.

may be directed shall be entitled to the same fees and may be subject to the same penalties for any neglect, as are allowed and provided for executions issued out of justices courts; and for all other services and commitments under the Military Code, the sheriff, jailer and constables executing the same shall be entitled to the like fees as for similar services in civil cases.¹

§ 761. Any civil or military officer who shall neglect or refuse to perform any of the duties required of him by the provisions of the Military Code shall forfeit and pay the sum of not less than twenty-five nor more than one hundred dollars for each and every offence to be recovered in the name of the people of the State of New York, and be deemed guilty of a misdemeanor, punishable by fine or imprisonment according to the aggravation of the offence. And in case any such civil or military officer shall embezzle, misapply or retain in his possession without authority any of the public money appropriated for military purposes over which he may have any control, he shall be deemed guilty of a felony. And it shall be the duty of the district attorney of any county within which such offender resides upon the complaint of the commanding officer of the brigade, regiment, battalion, or separate troop or battery located in such county, to prosecute such offender in any court of competent civil jurisdiction. Any penalty incurred under this section shall be paid into the treasury of the said county, and belong to the military fund of the regiment, battalion or separate troop or battery to which the offender belongs, or in which the case may have arisen.²

§ 762. In addition to the bond now required by law to be given by a sheriff, constable or other officer for the faithful discharge of his duties, such named officers shall execute a bond for the payment of all moneys by them collected, under the provisions of the Military Code; and the sureties of such officers hereby authorized to collect fines and penalties, shall be liable for any official delinquency under such act; such bond to be approved by the county judge of the county in which said sheriff, constable or other officer resides.²

21. ELECTIONS. ^a

§ 763. The sheriff, clerk or county judge of each county, who shall receive a notice of an election, from the secretary of state, or board of county canvassers, shall, without delay, deliver a copy of such notice to the supervisor or one of the assessors of each town or ward in his county. He shall also cause a copy of such notice to be pub-

¹ Military Code 1870, § 203.

² Id. § 267.

^a Ill.—1 St. 466.

² Military Code 1870, § 218.

Mich.—R. S. 42.

lished in all the public newspapers in his county, once in each week, until the election therein specified; if there be none printed in his county, then in some newspaper of an adjoining county.¹ The sheriff or clerk of the county of New York, who shall receive notice of an election, shall without delay deliver a copy thereof to the board of supervisors of said county and each supervisor and also cause a copy to be published once a week until the election, in such newspapers in said county not exceeding fifteen, having the largest circulation in the county and city.²

CHAPTER XXXIX.

OF THEIR DUTIES IN SURROGATES' COURTS.

§ 764. Every surrogate shall have power,

1. To issue subpoenas under his seal of office, to compel the attendance of any witness residing or being in any part of this state, or the production of any paper, material to any inquiry pending in his court, the form of which shall be similar to that used by courts of record in like cases;

2. To punish disobedience to any such subpoena, and to punish witnesses for refusing to testify after appearing, in the same manner and to the same extent as courts of record in similar cases, and by process similar in form to that used by such courts;

3. To issue citations to parties in all matters cognizable in his court, and in the cases prescribed by law, to compel the attendance of such parties;

4. To enforce all lawful orders, process and decrees of his court, by attachment against the persons of those who shall neglect or refuse to comply with such orders or decrees, or to execute such process; which attachments shall be in form similar to that used by the court of chancery in analogous cases;

5. To preserve order in his court during any judicial proceedings, by punishing contempts which amount to an actual interruption of business, or to an open and direct contempt of his authority or person, in the same manner and to the same extent as courts of record;³

6. To commit witnesses who have committed perjury in proceedings before him;⁴

¹ 1 R. S. 422, § 14.

² 4 R. S. 123, § 1.

3 R. S. 364, § 16.

⁴ Laws 1867, Ch. 682, § 15.

^a Ala.—R. C. 1867, §§ 799, 806, 2306.

Mich.—R. S. 374.

Minn.—R. S. 1866, § 491.

O.—2 R. S. 1215.

Wis.—R. S. 649.

Miss.—Rev. Code, p. 428.

7. In case of neglect of the board of supervisors of the county to provide the surrogates' court with rooms, fuel, lights and stationery, the court by order duly entered may direct the sheriff to do so, and the expense when certified by the sheriff shall be a county charge.¹

§ 765. Process of attachment or other compulsory process, authorized by law to enforce the orders, process or decrees of surrogates' courts, may be issued by the surrogate of one county to the officers required by law to serve such process in any other county of the state where it may be necessary to serve the same; and the officer receiving the same shall have power and authority to arrest the person or persons against whom such process is issued, and to convey the person or persons so arrested, to the county and place where the writ may be returnable.² But it has been held that a surrogate has no power to issue an attachment against a witness to bring him up to testify, and if a sheriff should refuse to execute such attachment, he would not be in contempt. And if, in such case, the surrogate should issue an attachment against him therefor, to the coroner, and the same should be executed, such surrogate would be a trespasser. He has power to punish one who disobeys a subpoena, to appear and testify, but not to bring him up on attachment to testify.³

§ 766. All attachments and other compulsory process, which may be issued by any surrogate, shall be made returnable to the county where the same may issue; and the tenth, twelfth and thirteenth sections, and sections sixteenth to thirty-second, title thirteenth of chapter eight of the third part of the Revised Statutes, inclusive, shall apply to attachments issued by surrogates.⁴

§ 767. Every sheriff, jailer, coroner or other executive officer to whom any citation, subpoena, attachment or other process issued by a surrogate's court, may be directed or delivered for the purpose of being executed, shall execute the same in the same manner as if issued by a court of record, and for any neglect or misfeasance therein shall be subject to the same penalties, actions and proceedings, as if the same had occurred in relation to any process issued by courts of record.⁵

§ 768. Disobedience to any subpoena to appear and prove a will, or to produce any will before a surrogate, shall be proceeded against and punished as in other cases of proceedings before surrogates. If any person be committed for not producing any will, he may be discharged on producing the same to the surrogate who committed him, by an order for that purpose.⁶

¹ Laws 1867, Ch. 782, § 10.

² 3 R. S. 366, § 20.

³ 5 Denio 537, *Perry v. Mitchell*.

⁴ 3 R. S. 366, §§ 21

⁵ 3 R. S. 367, § 24.

⁶ 3 R. S. 139, § 8.

§ 768. A citation to appear and attend the probate of a will shall be served on the person to whom it is directed, as follows :

1. On such as reside in the same county with the surrogate, or an adjoining county, by delivering a copy to such person, at least eight days before the day appointed for taking the proof, or by leaving a copy at least eight days as aforesaid, at the dwelling house or other place of residence of such person, with some individual of suitable age and discretion, and under such circumstances as shall induce a reasonable presumption in the mind of the surrogate that the copy came to the hands or knowledge of the person to be served with it, in time for him to attend the probate of the will ;

2. On such as reside in any other county in this state, by delivering a copy personally to such person, or leaving it at his dwelling house or other place of residence, in the manner and under the circumstances above mentioned, at least fifteen days before the day appointed for taking the proof ;

3. On such persons as do not reside in this state, citations may be served by delivering a copy personally to such persons, or leaving it at his or her dwelling house or other place of residence, not less than fifteen days nor more than ninety days before the day appointed for taking proof of any will ; and on such persons as do not reside in this state, or whose places of residence cannot be ascertained, by publishing a copy of the citation in the state paper, for six weeks previous to the day appointed for taking the proof.¹

§ 770. Where one applies for administration, either with the will annexed or in case of intestacy, and there shall be any other person having a prior right, and a citation be issued, if any person to whom such citation shall be directed shall reside within the county of such surrogate, such citation shall be served personally, or by leaving a copy at the residence of such person, at least six days before the return day thereof ; if any such person reside out of such county, but within the state, and such residence can be ascertained, service shall be made in the same manner, at least forty days before the return day of the citation ; if any such person reside out of the state, or his residence cannot be ascertained, such citation may be personally served without the state forty days before its return, or may be published once in each week, for six weeks successively, in the state paper.²

§ 771. The service of a citation upon an executor or administrator, against whom complaint has been made to the surrogate, shall be

¹ 3 R. S. 147, § 53.

² 3 R. S. 160, § 36.

made personally on the person to whom it may be directed, at least six days before the return thereof, if he be in the county; and if he shall have absconded from the county, it may be served by leaving it at his place of residence.¹

§ 772. A citation of a surrogate to a guardian, against whom a complaint shall have been made, for misconduct on his part, to appear and show cause why he should not be removed from his guardianship, shall be served personally on the guardian, to whom it may be directed, at least fourteen days before the return thereof; or if such guardian shall have absconded or concealed himself so that such citation cannot be personally served, it may be served by leaving a copy thereof, at the last place of residence of such guardian.²

§ 773. Where a guardian seeks to resign his trust, the citation to the ward to show cause why such guardian should not be at liberty to resign his trust, shall be served by delivering a copy to the ward at least ten days before the return day thereof.³

§ 774. Where the citation is issued for the attendance of parties upon the probate of a will, proof of the service thereof can only be made by the affidavit of the person making such service, whether he be the sheriff, or any other public officer or private citizen.⁴ In all other cases, the certificate of the sheriff of the due service of a citation will be sufficient.

§ 775. Whenever in any of the cases in which the public administrator of the city of New York is authorized to take charge of the effects of any intestate, any goods, chattels, credits or effects of the deceased or of which he had possession at the time of his death, or within twenty days previous thereto, shall not have been delivered to the public administrator, nor accounted for satisfactorily, by the persons who were about the deceased in his last sickness, or in whose hands the effects of the deceased, or any of them, may be supposed at any time to have fallen, the public administrator may institute an inquiry concerning the same; and upon satisfying the surrogate of the city and county of New York, by affidavit, that there are reasonable grounds for suspecting that any such effects are concealed or withheld, he shall be entitled to a subpoena to be issued by the surrogate under his seal of office, to such persons as the said public administrator shall designate, requiring them to appear before such surrogate, at the time and place therein to be specified, for the purpose of being examined touching the estate and effects of the deceased.⁵

¹ 3 R. S. 157, § 19; 3 R. S. 163, § 46.

² 3 R. S. 245, § 15.

³ 3 R. S. 163, § 52.

⁴ 3 R. S. 148, § 55.

⁵ 3 R. S. 207, § 8.

§ 776. If the surrogate be absent from the city of New York, such application for a subpoena may be made to any justice of the supreme court elected for the district, to the first judge of the court of common pleas of the said city and county, or to the mayor or recorder of the said city, either of whom is authorized to issue such subpoena, under his hand and private seal, in the same manner as the surrogate.¹

§ 777. Such subpoena shall be served in the same manner as in civil causes, and if any person shall refuse or neglect to obey the same, or shall refuse to answer touching the matters hereinafter mentioned, he shall be attached and committed to prison by the said surrogate or other officer so issuing such subpoena, in the same manner as for disobedience of any citation or subpoena issued by a surrogate in any case within his jurisdiction.²

§ 778. Upon the appearance of any person so subpoenaed before such surrogate or other officer, he shall be sworn truly to answer all questions concerning the estate and effects of the deceased, and shall be examined fully and at large by the public administrator, in relation to the said effects.³

§ 779. If, upon any inquiry it shall appear to the officer conducting the same, that any effects of the deceased are concealed or withheld, and the person having the possession of such property shall not give the security required by law for the delivery of the same, such officer shall issue his warrant, directed to the sheriff, marshals and constables of the said city or county where such effects may be, commanding them to search for and seize the said effects, and for that purpose, if necessary, to break open any house, in the day time, and to deliver the said property so seized, to the public administrator, which warrant shall be obeyed by the officers to whom the same shall be directed and delivered, in the same manner as the process of a court of record.⁴

§ 780. If any of the effects, whereof the county treasurer of any of the counties of this state, as public administrator of such county, is authorized to take charge, shall be concealed or withheld, he shall be entitled to the same process from the surrogate or county judge of the county, to discover and seize the same, on the same evidence and on the like terms, as the public administrator of the city of New York.⁵

¹ 3 R. S. 207, § 9.

² 3 R. S. 207, § 10.

³ 3 R. S. 208, § 11.

⁴ 3 R. S. 208, § 12.

⁵ 3 R. S. 216, § 50.

CHAPTER XL.

BONDS TAKEN BY SHERIFFS.

§ 781. No sheriff or other officer, shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than as herein directed, shall be void.¹ This provision of the statute is intended to prohibit any sheriff, coroner, constable or officer of that description² from taking any bond as security or indemnity against any neglect of official duty; or for the doing any act which he is not authorized to do or perform by virtue of his office, or the process under which he acts; and from taking any bond from any party as an indemnity or security that the party will do or perform some act such officer is not authorized to require him to do or perform. In every such case the bond will be deemed to be taken by color of office, which implies corruptly and unlawfully. All such bonds are held void from considerations of public policy. But the statute does not declare any bond, good at the common law, invalid. If a bond is not prohibited by law, and is not taken for ease and favor, that is, as a consideration and indemnity for granting to a debtor or a prisoner some indulgence or privilege he is not by law entitled to, nor received under duress or oppression or illegal exaction, it will not be void.³

§ 782. The bonds or securities which the sheriff may take are the bonds of the under sheriff, deputies and jailers for the due performance of their duties, and the payment to the sheriff of his proportion of the fees of the office;⁴ the bonds or indemnities to save him harmless for acts done by him or his officers under and pursuant to process at the request of the party issuing such process, as the making a levy or sale, or the paying over money where there is a dispute as to the ownership of the property;⁵ the bond or receipt of a "receiptor" or one with whom he leaves the defendant's property after levy.⁶ But such last mentioned bond, receipt or undertaking ought not to pro-

¹ 3 R. S. 476, § 48; 37 Barb. 179, *Morton v. Campbell*.

² 4 Barb. 51, *Webb v. Albertson*.

³ 23 Wend. 606, *Burrall v. Acker*; 7 John. 159, *Love v. Palmer*; 2 John. Ca. 239, *Dole v. Bull*.

⁴ 1 Hill 21, *Mott v. Robins*.

⁵ 19 N. Y. 115, *Chamberlain v. Beller*; 24 Miss. 96, *Forniquet v. Tegarden*. In California it has been held that an indemnity for seizing goods on an execution will be good if the

parties are in good faith seeking to enforce a legal right; but that it will be otherwise if the act done is a wilful trespass, 18 Cal. 622, *Stark v. Ramsay*. And in Alabama it has been held that if the execution is void a bond of indemnity against the levy under it will also be void, 27 Ala. N. S. 291.

⁶ 21 Wend. 605, *Acker v. Burrall*; 23 Wend. 606 *Burrall v. Acker*.

vide for any liability beyond what the sheriff is liable for the goods upon the execution.¹ The bond or undertaking taken on the arrest of a defendant in an action or an attachment,² or for the liberties of the jail, or in relation to the delivery of personal property, and such bonds as he is required to take under and by virtue of any statute in any special proceeding or matter.³ A bond of indemnity to a sheriff against an escape which has already taken place is good⁴ and an undertaking in the form of a penal bond is good when it contains the conditions required by the Code.

§ 783. Any bond or indemnity taken by any officer to indemnify him against an action for neglect of duty on his part, is void,⁵ as a bond conditioned to indemnify him against an action for not taking one to prison against whom he has a *capias*; or where it is taken to indemnify him against a return of *nulla bona*, where there are goods subject to the execution.⁶ So of a promise to a sheriff to indemnify him against all damages which he may sustain in consequence of discharging one from custody on legal process.⁷ And it has been held that where one arrested, represented to the sheriff that the attachment on which he was arrested was void, and promised to indemnify the sheriff, if he would let him go, that such promise was void.⁸ And so will be any agreement with a sheriff by which a party under arrest is permitted to go at large, upon any terms other than are prescribed by statute. But it is otherwise if such agreement is made with the party in interest and not with the sheriff.⁹ If the sheriff takes a note or draft on an arrest, as security, it is illegal and its transfer is void;¹⁰ and if taken without the plaintiff's assent, it is no payment or satisfaction of the judgment.¹¹ But if the plaintiff treat the transaction as a payment, the sheriff or the plaintiff may recover on the security. A bond taken as temporary security, where it is agreed that the defendant shall furnish other bail, is void; but the sheriff may give it up to the surety, and require new bail, and if not given he may arrest the defendant and confine him until it is given.¹² Where one has been suffered, voluntarily, to escape, a bond given by him for the limits on being retaken is void for duress.¹³ A bond and warrant to the sheriff on discharging a defendant from arrest on a *capias*, together with

¹ 5 Hill, 588, *Browning v. Hanford*.

² 37 Barb. 179, *Morton v. Campbell*.

³ 1 Caines 450, *Given v. Driggs*; 7 John. 159, *Love v. Palmer*.

⁴ 5 How. 386, *Conklin v. Dutcher*.

⁵ 1 Com. 365, *Winter v. Kinney*.

⁶ 7 John. 159, *Love v. Palmer*.

⁷ 19 Wend. 188, *Webber v. Blunt*; 7 John. 159, *Love v. Palmer*.

⁸ 19 Wend. 188, *Webber v. Blunt*; 1 Com. 365, *Winter v. Kinney*.

⁹ 1 Com. 365, *Winter v. Kinney*.

¹⁰ 8 John. 98, *Strong v. Tompkins*.

¹¹ 1 Cow. 46, *The Bank of Orange Co. v. Wakeman*; 4 Cow. 553, *Munford v. Armstrong*; 6 Cow. 465, *Armstrong v. Garrow*.

¹² 7 Wend. 188, *Bronson v. Noyes*.

15 John. 256, *Thompson v. Lockwood*.

additional charges of the sheriff as jailer, was set aside as leading to abuse and oppression, the court inclining to the opinion that the bond was void as one taken by color of office.¹ And so where a bond for the limits has any other conditions than those prescribed by the statute, it is void.² And a warrant of attorney given simultaneously with the bond for the limits authorizing a confession of judgment thereon, is void.³ A bond taken in a penalty exceeding one hundred dollars, upon an arrest upon attachment without any order fixing the bail is void, as taken by color of office.⁴ A note taken by the sheriff from a defendant, under a threat of selling his property on an execution then in his hands, which he owned, but kept that fact concealed from the defendant, was held void in the sheriff's hands.⁵ And so is a note, taken by a constable as security for an execution, unless it is ratified by the plaintiff.⁶ A bond, too, will be void though it be authorized by the statute, and be proper in form, if the condition upon which it might be required did not exist.⁷

§ 784. As a general rule, a bond taken by an officer, though it be authorized by the statute, will be void, if it does not conform to the statute.⁸ But it has been provided by statute, that whenever a bond is or shall be required by law to be given by any person, in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all respects to the form thereof prescribed by any statute, but the same shall be deemed sufficient if it conform thereto substantially, and do not vary in any matter, to the prejudice of the rights of the party, to whom or for whose benefit such bond shall have been given.⁹ Whenever any such bond is defective in any respect, the court, officer or body who would be authorized to receive the same, or to entertain any proceedings, in consequence of such bond, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect; and such bond shall thereupon be deemed valid from the time of the execution thereof.¹⁰ It was formerly necessary in a replevin bond, to have two sureties, but under the foregoing provisions of the statute, a bond with one surety has been held good.¹¹

§ 785. Whenever the sheriff or any other officer is authorized or required by law to take any sureties or bail, or to approve any

¹ 7 John. 319, *Richmond v. Roberts*.

² 19 John. 233, *Sullivan v. Alexander*.

³ 1 John. Ca. 129, *Dole v. Moulton*.

⁴ 21 Wend. 57, *Bank of Buffalo v. Boughton*.

⁵ 23 Wend. 314, *Mills v. Young*.

⁶ 2 Cow. Tr. 564.

⁷ 1 Hill 343, *Germond v. The People ex rel. Taylor*.

⁸ 1 Hill 298, *The People v. Meighan*; 37 Barb. 179, *Morton v. Campbell*.

⁹ 3 R. S. 870, § 35.

¹⁰ 3 R. S. 870, § 36.

¹¹ 3 Com. 188, *Shaw v. Tobias*; 37 Barb. 179, *Morton v. Campbell*.

sureties or bail, he shall be authorized to administer an oath to every person who shall be offered as such bail or surety, to ascertain his sufficiency.¹

§ 786. It is provided by the rules of the supreme court, that all bonds and undertakings and other securities in writing, shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.² Such proof or acknowledgment must be made or taken before some officer authorized to take the proof or acknowledgment of deeds.

§ 787. The residence and occupation of the sureties in an undertaking on arrest must be given, and whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.³

§ 788. The bond or undertaking on the arrest of the defendant, must be filed with the clerk of the court in which the action is pending, and must be duly proved or acknowledged before it can be filed. The undertakings given on taking personal property shall, after the sureties have justified, be delivered by the sheriff to the parties for whose benefit the same were taken.⁴

§ 789. Whenever any sheriff is required by law to assign any bond taken by him in the progress of any cause or proceeding, to any party, and the office of such sheriff shall be vacant, his under sheriff, or the person acting in the place of such sheriff, is authorized, and may be compelled to execute such assignment in the name of the sheriff to whom such bond was given; which assignment shall be valid and effectual as if executed by such sheriff.⁵

CHAPTER XLI.

ATTACHMENTS FOR CONTEMPT. ^a

§ 790. A writ of attachment, as for a contempt, is process issued by a court or officer of competent jurisdiction, against a party charged with some offence or neglect of duty in the nature of a contempt and commands the officer to whom the same is directed and delivered for execution, to attach and bring such party before such court or officer, either forthwith, or at the time mentioned in such writ, that he may

¹ 3 R. S. 866, § 9; Reviser's notes, 3 R. S. 777, 2d ed.

² Rule 6 Sup. Ct.

³ Rule 6 Sup. Ct.; Code § 193; 6 How. 447, *Blood v. Wilder*.

⁴ Code § 423.

⁵ 3 R. S. 476, § 49.

^a Cal.—Dig. 1860, p. 227.

Ill.—1 St. 263.

Mich.—St. 1857, p. 1130.

Minn.—Rev. 1866, p. 579.

Miss.—Rev. Code, p. 511, 614, 624.

Nev.—St. 1869, p. 266.

On.—Gen. L. 311.

Penn.—Dig. 1861, p. 188.

make answer to the matters alleged against him. Such attachments are in some cases purely criminal in their character, but they are more frequently merely civil proceedings for the purpose of enforcing some civil remedy. When the writ is issued by a judge out of court it should be made returnable before himself and not before one of the judges of the court at chambers. But the defect is amendable and is waived by the party giving a bond.¹

§ 791. When the attachment is issued for the purpose of punishing a party as for a criminal contempt, and not merely as a means of enforcing a civil remedy, it is criminal process, and may be executed at the same times and places, and in the same manner as criminal process. The sheriff to whom the same is directed and delivered for execution, may execute the same, within or beyond the limits of his county, in the day or in the night, and on demand that they be opened and refusal, may break open all doors necessary to execute the process. To authorize the execution of such process as criminal process however, it should appear upon its face to have been issued as such. Whenever any person shall be committed for any criminal contempt, the particular circumstances of his offence shall be set forth in the order or warrant of commitment.²

§ 792. The mode of proceeding as for contempts, to enforce civil remedies and to protect the rights of parties in civil actions, is pointed out by the statute. It is declared therein, that every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court, may be defeated, impaired, impeded or prejudiced, in the following cases:

1. All attorneys, counsellors, solicitors, clerks, registers, sheriffs, coroners, and all other persons in any manner duly selected or appointed to perform any judicial or ministerial services, for any misbehavior in such office or trust, or for any wilful neglect or violation of duty therein; for disobedience of any process of such court, or of any lawful order thereof, or of any lawful order of a judge of such court, or of any officer authorized to perform the duties of such judge;

2. Parties to suits, for putting in fictitious bail or sureties, or for any deceit or abuse of the process or proceedings of the court;

3. Parties to suits, attorneys, counsellors, solicitors and all other persons, for the nonpayment of any sum of money ordered by such court to be paid in cases where by law execution cannot be awarded

¹ 28 N. Y. 318, *Kelly v. McCormick*.

² 3 R. S. 470, § 11.

for the collection of such sum; and for any other disobedience to any lawful order, decree or process of such court;

4. All persons for assuming to be officers, attorneys, solicitors or counsellors of any court, and acting as such without authority; for rescuing any property or persons, which shall be in the custody of any officer, by virtue of process issued from such court; for unlawfully detaining any witness or party to a suit, while going to, remaining at, or returning from, the court where such suit shall be noticed for trial; and for any other unlawful interference with the process or proceedings in any action;

5. All persons summoned as witnesses, for refusing or neglecting to obey such summons, or to attend or be sworn, or answer, as such witness;

6. Persons summoned as jurors in any court, for improperly conversing with any party to a suit to be tried at such court, or with any other person, in relation to the merits of such suit; for receiving communications from any such party, or from any other person, in relation to the merits of any such suit, without immediately disclosing the same to the court;

7. All inferior magistrates, officers and tribunals, for disobedience of any lawful order or process of a superior court, or for proceeding in any cause or matter contrary to law, after such cause or matter shall have been removed from their jurisdiction; and,

8. All other cases, where attachments and proceedings as for contempts, have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party.¹

§ 793. Under the provisions of the last subdivision of the preceding section, it has been held that where a party was directed to deposit certain books in the master's office, with liberty to the adverse party to inspect and take extracts from such parts as related to certain partnership transactions, and in obedience to the order the books were deposited in the master's office with the parts thereof which did not relate to the partnership transactions sealed up and during a temporary absence of the master the adverse party who was inspecting the books, broke open the parts which were so sealed up and which contained private memoranda and remarks of the party who deposited the books, in relation to his private business, that the act of such party was a contempt of court.²

§ 794. When any misconduct punishable by fine and imprison-

¹ 2 R. S. 849, § 1; 2 Paige 494, *Dias v. Merle*. ² 2 Paige 494, *Dias v. Merle*.

ment, as before mentioned, shall be committed in the immediate view and presence of the court, it may be punished summarily, by fine or imprisonment, or both, as hereinafter mentioned.¹ The jurisdiction of courts of record as to the person in cases of commitment for contempt, is to be intended, and a rule of such court, that a defendant be committed for contempt, need not recite the prior proceedings. If it is such a rule as the court might legally make under any supposable state of circumstances, all jurisdictional steps and matters of regularity are to be presumed. It is necessary, however, that the rule for commitment should show the cause thereof. It is enough, however, that the cause be substantially stated, though without technical precision. Courts of record may commit for contempt by rule merely, without other process, though inferior courts cannot commit without a regular warrant.²

§ 795. When such misconduct is not so committed, the court shall be satisfied by due proof, by affidavit, of the facts charged, and shall cause a copy of such affidavits to be served on the party accused, a reasonable time to enable him to make his defense; except in cases of disobedience to any rule or order requiring the payment of money and of disobedience to any subpoena.³

§ 796. When any rule or order of a court shall have been made for the payment of costs, or any other sum of money, and proof by affidavit shall be made of the personal demand of such sum of money, of the party himself,⁴ and of a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison, until such sum and the costs and expenses of the proceeding, be paid. If the party in contempt is exempt by statute from arrest on civil process, the sheriff may refuse to execute the attachment, though he is not bound to take notice of the privilege of exemption.⁵ But no person shall be imprisoned for the nonpayment of interlocutory costs, or for contempt of court in not paying costs, ~~except attorneys, solicitors and counselors~~ and officers of courts, when ordered to pay costs for misconduct as such, and witnesses when ordered to pay costs on attachment for nonattendance.⁶ The foregoing provisions prohibiting the imprisonment of any person for interlocutory costs unless in the cases therein excepted, does not apply to those cases of contempt where a party may be fined for any misconduct productive of an actual loss or injury to the other party.⁷

¹ 3 R. S. 850, § 2.

² 1 Hill 154, *The People ex rel. Johnson v. Nevins*.

³ 3 R. S. 850, § 3.

⁴ 9 Paige 609, *Lorton v. Seaman*.

⁵ 40 N. Y. 133, *The People ex rel. Gaston v. Campbell*.

⁶ 3 R. S. 850, § 4.

⁷ 2 Barb. 396, *Livingston v. Fitzgerald*.

§ 797. Attachments as for contempts as a means of enforcing a civil remedy, are most frequently resorted to in the case of witnesses who neglect to appear in pursuance of a subpoena; and against sheriffs and other officers who fail to execute process or make return thereof, according to the command of such process. The mode of proceeding in the case of a witness who makes default, has already been pointed out.¹

§ 798. In all other cases than those of disobedience to a rule or order requiring the payment of money, and of disobedience to a subpoena, and where the misconduct is not committed in view and presence of the court, the court shall either grant an order on the accused party, to show cause at some reasonable time to be therein specified, why he should not be punished for the alleged misconduct; or shall issue an attachment to arrest such party, and to bring him before such court, to answer for such misconduct.²

§ 799. The Revised Statutes declare that where a rule shall have been entered in any court, according to the practice thereof, requiring any officer or other person to whom any process of such court may have been directed and delivered, to return the same, an attachment for disobedience of such rule may issue according to the course and practice of the court, to arrest such officer or other person, to answer for such disobedience without special application to the court.³ The practice of the courts, however, as now settled, does not permit of the issuing an attachment in any such case without special application to the court. Rule eight of the rules of the supreme court provides that at any time after the day when it is the duty of the sheriff or other officer to return, deliver or file any process, undertaking, order or other paper, by the provisions of the Code of Procedure, any party entitled to have such act done, may serve on the officer a notice to return, deliver or file such process, undertaking, order or other paper as the case may be, within ten days; or show cause at a special term to be designated in said return why an attachment should not be issued against him.⁴

§ 800. Such notice must be served personally on the sheriff, or if he cannot be found, then it may be left at his office at any hour during which the same is by law required to be kept open. If any person belonging to the office be therein, such notice or paper shall be delivered to such person; and every such service shall be deemed equivalent to a personal service on such sheriff. If no notice shall have been filed by any sheriff with the county clerk, of the place of

¹ Ante §§ 183, &c.

² 3 R. S. 851, § 5.

³ 3 R. S. 851, § 6.

⁴ Rule 8 Sup. Ct.; Code, § 419

such office as required, the service of the notice on such sheriff may be made by leaving it at the office of the county clerk, with such clerk or his deputy; and the same shall be deemed equivalent to a personal service on such sheriff.¹ Service of such notice upon the under sheriff or upon a deputy of the sheriff, although he be the party in default, will not be a good service to bring the sheriff into contempt. And when an action has been commenced, service of any such notice on the attorney for the sheriff will not be sufficient for that purpose.² It must be made upon the sheriff personally, or in the manner hereinbefore pointed out.

§ 801. If the sheriff have any sufficient excuse for not making the return as required by law, or have any valid defence to the application for an attachment for such neglect, he should appear before the court in person or by attorney on the day designated in such notice, and present such excuse or defence by affidavit in answer to the motion for an attachment. Thus, if the paper or process which he is required to return, has never come to his hands, or the hands of his deputy, he must show such fact by affidavit, and it will be a good answer to the application. So if there be a stay of proceedings, by reason of which the execution of the process could not be completed by the return day; or if there has been delay caused by the party seeking the return, or his attorney; or if the officer has been sick so that he could not execute and return the process; or where the process is in the hands of a special deputy, appointed by the sheriff at the request of the party seeking to enforce the return; or where the parties to the execution have compromised before the sale, or any other like valid excuse, it should be set up by way of answer to the application for an attachment.³ It will not be an answer, however, to any such application, that the process was not received by the sheriff himself, but by a deputy.⁴ Nor is it a good answer that the defendant in the action in which the execution issued, had sued out a writ of error to reverse the judgment, unless there was a stay of proceedings.⁵ It was formerly held that it would be no answer to a motion for an attachment against the sheriff, that the statute of limitations barred an action against the sheriff for not returning process, and that the sheriff would still be compelled to return it.⁶ But it has since been held, that where the sheriff had violated his duty in allowing money to be received and appropriated by the attorney on a sale of lands in a partition suit,

¹ Ante, § 23.

² Code, 418.

³ Ante, § 427.

⁴ 6 Cow. 41, *The People v. Brown*.

⁵ 9 Wend. 224, *The People v. Allen*.

⁶ 4 Hill 71, *The People ex rel. Southwick v. Everest*.

that the statute of limitations will bar summary proceedings to compel the sheriff to make report and payment of the money, where the statute would be a bar to an action for the nonpayment of the money.¹ Delay, unless there has been gross negligence, to the prejudice of the sheriff will not be a valid excuse.² If the sheriff has no valid excuse for not returning the process, at the proper time, he should do so as soon as he is notified to return the same, and give the party notice thereof. If he does so before the time at which he is required to show cause, no attachment will be granted. But if the party has suffered injury by such neglect, he will seek his remedy by action.

§ 802. If the sheriff has no valid excuse for not returning the paper or process; and if he neglects to return the same before the time at which he is required to show cause why an attachment should not issue against him for such neglect, the court at which he is so required to show cause, on due proof of the service of the notice upon such sheriff, and of such motion, and of the default of the sheriff to make such return, will grant an attachment against him to bring him up, in order that he may be punished for such contempt.

§ 803. When the attachment is so issued by the special order of the court, a certificate to that effect shall be indorsed thereon by the clerk of the court. And the court shall direct the penalty in which the defendant shall give bond for his appearance to answer.³ Such order is indorsed on the attachment, and is signed by the presiding judge of the court.⁴

§ 804. When the attachment is against the old sheriff, or any other person, it is issued to the present sheriff.⁵ If it is against the present sheriff it is issued to one of the coroners of the same county.⁶ If the attachment be against one for disobedience to a subpoena, it may, as has been already seen, be issued to the sheriff of the county where the court is sitting, who may execute the process in any part of the state.⁷ But in all other cases, the attachment should be issued to an officer of the county where the party in contempt may be. In the case of attachments issued by surrogates' courts, it is provided by statute that the process shall be so issued.⁸

§ 805. Writs of attachment, in such cases, though they are in form criminal process, cannot be executed like criminal process. They are said to be analogous to mesne process, and the same rules, so far as they can be applicable, govern their execution. They may be served

¹ 31 Barb. 439, *Van Tassel v. Van Tassel*.

² Sewell 421.

³ 2 R. S. 852, § 14.

⁴ 2 R. S. 851, § 10.

⁵ 23 Wend. 102, *Anon.*

⁶ 3 R. S. 741, § 109; Code, § 419.

⁷ Ante, § 185.

⁸ Ante, § 765.

in the night or day, but not upon Sunday, nor can the outer door of a dwelling be broken open to come at the party to make the arrest.

§ 806. Upon arresting any defendant upon an attachment to answer for any alleged misconduct, if no sum be specified in which the defendant shall be held to bail on such writ, he shall not be entitled to be discharged from the arrest thereon upon executing any bond, or in any other manner unless upon the special order of the court issuing the attachment, but the officer making the arrest shall keep the defendant in his actual custody, and shall bring him personally before the court issuing the attachment; and shall keep and detain him in his custody, until such court shall have made some order in the premises.¹ If such sum be indorsed on the writ, the defendant may be discharged upon executing the bond as hereinafter mentioned.²

§ 807. Whenever an officer is required to keep any person arrested upon attachment, in actual custody, and to bring him personally before any court, the inability from sickness or otherwise, of such person to attend such court personally, shall be a sufficient excuse for not bringing him before such court. Nor shall any such officer be required in any case, to confine any person arrested upon an attachment to answer for misconduct, in any prison, or otherwise to restrain him of his personal liberty, except so far as shall be necessary to secure his personal attendance. Jurisdiction of the person once acquired, by arrest under an attachment for contempt, continues while the case is under examination, whether the defendant remain in actual custody or not.

§ 808. It has already been seen that a party charged with contempt, who is in custody, may be brought up on habeas corpus to answer for such contempt.³

§ 809. In cases where a sum shall have been indorsed on any attachment issued by the special order of the court, the defendant shall be discharged from arrest on such attachment on executing and delivering to the officer making the same, at any time before the return day in such writ, a bond, with two sufficient sureties, in the penalty indorsed upon such attachment, to such officer, by his name of office and his assigns, with a condition that the defendant will appear on the return of such attachment, and abide the order and judgment of the court thereupon.⁴ It is the officer's duty to prepare the bond in such case, as by the sheriff on arrests on mesne process.⁵ And it is also his duty to see that the sureties are sufficient, otherwise he may be liable to the

¹ 3 R. S. 851, §§ 12-14; 1 Hill 154, *The People ex rel. Johnson v. Nevins*.

² *Post*, § 809.

³ 3 R. S. 855, § 37; 1 Hill 154, *The People ex rel. Johnson v. Nevins*.

⁴ *Ante*, § 647.

⁵ 3 R. S. 851, § 13.

⁶ 3 Paige 85, *The People ex rel. Griffith v. Elmer*.

party aggrieved, for the damages he may sustain, should they prove otherwise.¹ On returning the attachment, the officer executing the same shall return the bond taken of the defendant, which shall be filed with such attachment.² If the bond has only one surety, it will be irregular, but not void, and though the party in interest may refuse to accept it and treat the discharge of the defendant as an escape, yet if he elects to receive it, the bond will be good.³

§ 810. The sheriff or other officer, to whom any attachment shall be delivered for execution, shall return the same by the return day specified therein, without any previous rule or order for that purpose. If the defendant has been released upon the giving a bond as herein before mentioned, such attachment and bond are usually, in practice, returned directly to the attorney who issued the writ; but the more regular course would be to return the same to the clerk of the court, before which the same is returnable. If the defendant is not entitled to be discharged on giving bail, or if he neglects or refuses so to do, the sheriff or officer must bring such defendant personally before the court, and make return to the court, of his proceedings under the writ.

§ 811. In case of default in returning the writ, an attachment may be issued against such officer of course, upon being allowed by a judge of the court, or by some officer authorized to perform the duties of such judge, upon proof of such default; and in such allowance, the cause of issuing the same shall be stated, and that the defendant is not to be discharged upon bail, or in any other manner but by the order of the court.⁴ Though the attachment be returnable at a particular hour, the officer holding it is not compelled to return it at the hour, except by order of the court, if he be present. If he is absent an order of course for an attachment will be irregular if entered before the adjournment of the sittings of the day.⁵

§ 812. Under the old practice, where the sheriff was attached for not returning an execution, or any other default in the discharge of the duties of his office, he had four days in term, after the return day of the attachment against him, to appear and answer thereto.⁶ It was necessary that he should be called twice in full term, on the two nonenumerated motion days next succeeding or including the return day, before any bond given by him on his arrest, could be ordered to be prosecuted.⁷ The Code of Procedure and rules of the supreme

¹ Post, § 820.

² 3 R. S. 852, § 16.

³ 7 Barb. 179, *Morton v. Campbell*.

⁴ 3 R. S. 852, § 17; 3 Paige 85, *The People ex rel. Griffith v. Elmer*.

⁵ 7 Paige 432, *The People ex rel. Hunt v. Wheeler*.

⁶ 3 Wend. 423, *Anon.*

⁷ 20 Wend. 612, *The People ex rel. Oakley v. Acker*.

court have changed the practice, however, in such a manner as to render it impossible to follow the former course. Now attachments in the supreme court must be made returnable, not as formerly, at a general term thereof, but at a special term, in which there are no non-enumerated motion days. The course pursued in the different districts, is not well defined, but it would seem clear that no order to prosecute the bond would be valid before the close of the sitting of the court on the return day of the attachment.

§ 813. When any defendant arrested upon an attachment, shall have been brought into court, or shall have appeared therein, if he does not admit the contempt,¹ the court shall cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which the defendant shall make written answers on oath, within such reasonable time as the court shall allow. The court may receive any affidavits or other proofs, contradictory of the answer of the defendant, or in confirmation thereof; and upon the original affidavits, such answers and such subsequent proof, shall determine whether the defendant has been guilty of the misconduct alleged.²

§ 814. If the court shall adjudge the defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did defeat, impair, impede, or prejudice the rights or remedies of any party in a cause or matter depending in such court, it shall proceed to impose a fine or to imprison him, or both, as the nature of the case shall require; but the court may in its discretion, (in case of inability to perform the requirements imposed,) relieve the person or persons so imprisoned, in such manner and upon such terms as it shall deem just and proper.³

§ 815. If an actual loss or injury shall have been produced to any party, by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him on the order of the court. And in such case the payment and acceptance of such fine, shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss. In all other cases the fine shall not exceed two hundred and fifty dollars, over and above the costs and expenses of the proceedings.⁴

§ 816. When the misconduct complained of, consists in the omission to perform some act or duty, which it is yet in the power of the

¹ 9 Paige 372, *The Albany City Bank*
v. *Schemerhorn*.

³ 3 R. S. 852, § 20.

⁴ 3 R. S. 853, §§ 21, 22.

² 3 R. S. 852, § 19.

defendant to perform, he shall be imprisoned only, until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings. In such case the order and process of commitment shall specify the act or duty to be performed, and the amount of the fine and expenses to be paid.¹

§ 817. In all other cases, where no special provision is otherwise made by law, if imprisonment be ordered, it shall be for some reasonable time, not exceeding six months, and until the expenses of the proceedings are paid; and also if a fine be imposed, until such fine be paid; and in the order and process of commitment, the duration of such imprisonment shall be expressed.² The order for commitment must designate the particular misconduct of which the defendant is convicted.³

§ 818. If a defendant against whom an attachment shall have been issued and returned served, do not appear on the return day thereof, the court may either award another attachment, or may order the bond taken on the arrest to be prosecuted, or both. Such order shall operate as an assignment to the bond to any aggrieved party who shall be authorized by the court to prosecute the same, and such party may maintain an action thereon in his own name, as assignee of the sheriff or officer to whom the same was given, in the same manner as in other actions on bonds, with condition to perform covenants other than for the payment of money. The measure of damages to be assessed in such action, shall be the extent of the loss or injury sustained by such aggrieved party, by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment.⁴

§ 819. If there be no party aggrieved by the misconduct for which the attachment was issued, the court, in case the defendant shall fail to appear according to the condition of the bond taken on the arrest, shall order the same to be prosecuted by the attorney general or by the district attorney of the county in which the bond was taken, in the name of the officer who took such bond. In such case the whole penalty of the bond shall be forfeited and recovered, and from the moneys collected thereon, the court shall order such sum to be paid to the party prosecuting the attachment as the court ordering the prosecution shall think proper, to satisfy the costs and expenses incurred by him, and to compensate him for any injury he may have sustained by the misconduct for which such attachment was issued,

¹ 3 R. S. 853, §§ 23, 24.

² 3 R. S. 853, § 25.

³ 30 How. 131, *De Witt v. Dennis*.

⁴ 3 R. S. 853, §§ 27-29.

and the residue of such moneys shall be paid into the treasury of the state.¹

§ 820. If on the return of executions duly issued upon any judgment obtained on such bond, it shall appear that the sureties taken therein were, at the time of taking them, insufficient, and that the officer receiving them had reasonable grounds to doubt their sufficiency, he shall be liable in an action on the case, to the party aggrieved, who may have prosecuted such suit, for the amount of the judgment recovered by him, and for his costs and expenses in such suit; or if such suit was brought by the attorney general, or a district attorney, an action on the case may in like manner be brought by them, in the name of the people of this state, for the amount of the judgment so recovered; and the same disposition of the moneys collected in such action on the case against such officer, shall be made as directed in the last section.²

§ 821. Persons proceeded against under the provisions of the statute concerning proceedings as for contempts, to enforce civil remedies and to protect the rights of parties in civil actions, shall, notwithstanding, be liable to indictment for the same misconduct, if it be an indictable offence; but the court before which a conviction shall be had on such indictment, shall take into consideration the punishment before inflicted, in forming its sentence.³

§ 822. When any misconduct which, by the provisions of the said statute may be punished by fine or imprisonment, shall have occurred at any circuit court, or in reference to any process or proceedings pending in or returnable to such court, and which shall not have been punished by such court, the supreme court shall have the same jurisdiction and power to inquire into and punish the same as if such misconduct had occurred in the supreme court, or in reference to any process or proceedings therein.⁴

§ 823. When the sheriff is attached for not returning an execution, and he is fined the amount thereof, if he would protect himself against loss, he should at the time of the imposition of the fine, apply to the court that he be subrogated in the place of the plaintiff in the execution, or for such other relief, as under the circumstances of the case he may be entitled to. If it is not a wilful and corrupt case of misconduct, proper relief will be granted. But if the money is paid in pursuance of the order of the court, without some relief of the kind, the sheriff will be without remedy. The payment of the fine will be a satisfaction of execution, and the sheriff will not be entitled to

¹ 3 R. S. 854, §§ 30, 31.

² 3 R. S. 854, § 32.

³ 3 R. S. 853, § 26.

⁴ 3 R. S. 853, § 33.

recover the amount of the defendant. And if he takes an assignment of the judgment, or procures another to do so for his benefit, it is questioned whether he can enforce it.¹

CHAPTER XLII.

ACTIONS BY SHERIFFS.

§ 824. Sheriffs, coroners and constables may maintain an action for the recovery of the fees to which they may be entitled by law, for any service performed by them. If no fee is prescribed by law for the particular service, and they are not required to discharge the duty without compensation, then they are entitled to recover a reasonable compensation therefor.² And such action may be maintained either against the party for whom the service was rendered, or against his attorney in the action or proceeding.³ But if the officer elects to look to the attorney exclusively, and gives him the whole credit, he cannot afterwards resort to the party.⁴ In an action for his fees, the officer's return to the process will be *prima facie* evidence that the service was rendered, and of the amount of fees.⁵ But an officer cannot maintain an action on a promise of extra compensation for extra services, although he renders services beyond what was legally required of him.⁶ This is so, however, only in the cases where a fee certain is given for the service, and not where the officer is entitled to a reasonable compensation for his services, as he is in all cases where no fee is fixed by law, or he is not prohibited from receiving compensation therefor.⁷ Where the officer attaches property by direction of the creditor, and thereby makes himself personally liable for the charges for the storage thereof, he may recover the same of the creditor.

§ 825. When any person shall usurp, intrude into or unlawfully hold or exercise the office of sheriff, coroner or constable,⁸ an action may be brought by the attorney general in the name of the people of the state, or upon the relation or information of the person having an interest in the question, whose name in such case shall be joined with the people, as plaintiff.⁹ In addition to the statement of the cause of action, there may also be set forth in the complaint, the name of the

¹ Ante, § 427; 1 Kernan 61, Carpenter v. Stillwell.

² 9 John. 328, Smith v. Birdsall; 1 Cow. Tr. 140.

³ 5 John. 252, Adams v. Hopkins; 4 Wend. 474, Jackson ex d. Anderson v. Anderson.

⁴ 9 John. 114, Osterhout v. Day.

⁵ Cow. & Hill's notes, 1003.

⁶ 3 R. S. 939, § 5; 15 Wend. 44, Hatch v. Mann.

⁷ 9 John. 323, Smith v. Birdsall; 13 Wend. 257, The People ex. rel. Hilton v. Supervisors of Albany; 2 Denio 41, Supervisors of Onondaga County v. Briggs.

⁸ Code, § 432, sub. 1.

⁹ Code, § 434.

person rightfully entitled to the office, with a statement of his right thereto, and upon proof by affidavit, that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the supreme court, for the arrest of such defendant, and holding him to bail, and thereupon he shall be arrested and held to bail, in the manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions, where the defendant is subject to arrest.¹ In every such case, judgment shall be rendered upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.² If the judgment be rendered for the person so claiming the office, he shall recover costs,³ and shall be entitled, after taking the oath of office, and executing the official bond to take upon himself the execution of the office, and he may obtain possession of the books and papers belonging to the office in the manner heretofore pointed out.⁴ And he may recover, by action, the damages which he shall have sustained by reason of the usurpation by the defendant, of the office.⁵ In addition to a judgment of ouster and for costs upon the information, the court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the state.⁶

§ 826. When goods and chattels have been duly levied on or attached by an officer, under valid process against the owner thereof, or against one having an interest therein subject to levy under execution, or seizure under attachment, the officer holding such process thereby acquires a special property in such goods and chattels so levied on or attached, and may maintain an action against any one who interferes therewith, or injures them, or removes them, or converts them to his own use.⁷

§ 827. If, however, the goods are under a previous levy, by a different officer, under process issuing from a different jurisdiction, a subsequent levy will give the officer no lien thereon, and he cannot maintain any action founded on such levy.⁸ And if the property was not subject to the execution, the officer cannot maintain trespass against the owner, either for forcibly resisting the levy or for rescuing the goods.⁹ But the owner would not, in such case, be justified in

¹ Code, § 435.

² Code, § 436.

³ Code, § 441.

⁴ Ante, §§ 8, 680; Code, §§ 437, 438; 1 R. S. 416, §§ 62, 68.

⁵ Code, § 439.

⁶ Code, § 441.

⁷ 6 John. 195, *Barker v. Miller*; 1 Cow. 322, *Lockwood v. Bull*; 16 Wend.

562, *Earl v. Camp*; 3 Hill 215, *Dezell v. Odell*; *Sewell* 429; *Watson* 191.

⁸ 10 Peters 400, *Hagan v. Lucas*; 20 Wend. 41, *Dubois v. Harcourt*.

⁹ 3 Hill 215, *Dezell v. Odell*; *Watson* 191; 8 Pick. (Mass.) 133, *Commonwealth v. Kennard*.

committing an assault upon the officer when making such levy, though he may retake his goods peaceably if he can.¹

§ 828. The taking a bond or receipt from a third person, for the goods levied on, or attached, conditioned that they shall be forthcoming when demanded by the sheriff, or to pay the debt, does not divest the officer of his special interest in the property, but he may repossess himself of it, for the purpose of selling it or returning it to the owner, and he may maintain an action for it if taken by a third party.² And if such receiptor refuse to deliver it at the time, the sheriff may maintain an action against him for the goods, or for the amount agreed to be paid. And it will not be a defence that the levy was excessive nor the goods of less value than the amount agreed to be paid. Nor can the receiptor defend upon the ground that the goods were his own or the property of another.³ And where partnership property was levied on as against one member of the firm, and was receipted to the officer by the firm, they were not allowed to show that the property, after the giving the receipt, was applied to the purposes of the firm.⁴ Where the execution was for the collection of a military fine, it was held to be a good defence to an action against the receiptor, that the court had no jurisdiction.⁵ So if the officer be a constable, and he does not demand the property of the receiptor within the life of the execution, he loses his lien and the right of possession of the goods.⁶ But removing a cause by a certiorari is not a good defence for not delivering the goods at the time.⁷ Where the property is taken out of the receiptor's hands by any person other than the officer who holds the receipt, such receiptor may maintain an action against such person therefor, unless the property was not subject to the levy, and the same was taken by the rightful owner.⁸

§ 829. An officer cannot maintain an action against a stranger for taking any property levied on by him, after he has made a return upon the execution, by which, by order of the plaintiff he has formally released the levy.⁹ But where such officer has been induced to release such levy by a pretended claim to such property by another, the court, even after a return of nulla bona in such case, will direct such return to be stricken out, and will sustain an action against such party for the property.

¹ 13 Wend. 379, *The People v. Cooper* ;
13 Wend. 256, *Spencer v. McGowan*.

² 23 Wend. 606, *Burrall v. Acker* ; 1
Cow. Tr. 323 ; 2 Hall 425, *Hawkins*
v. Kingsland ; 3 Hill 215, *Dezell v.*
Odell.

³ 1 Cow. Tr. 323 ; 7 Cow. 294, *Dillen-*
bach v. Jerome ; 3 Hill 215, *Dezell*
v. Odell ; 15 Pick. 40, *Barclay v.*

Hamilton. See 8 N. H. 233, *Morri-*
son v. Blodgett ; 33 N. Y. 253, *Cornell*
v. Dakin.

⁴ 23 Wend. 606, *Burrall v. Acker*.

⁵ 2 Denio 643, *Dunlap v. Hunting*.

⁶ 9 John 361, *Brown v. Cook*.

⁷ 9 John. 68, *Blanchard v. Myers*.

⁸ 16 Wend. 335, *Miller v. Adsit*.

⁹ 3 Barb. 518, *Marsh v. White*.

§ 830. In all actions for the taking or the injuring of property levied on, the officer's indorsement upon the execution of such levy, is sufficient evidence, *prima facie*, of the levy and possession, and to identify the property, unless the execution is impeached as void.¹ And he may alter the return at any time before filing, or the court will permit him to alter it after it is filed, if necessary, so as to specify the particular property levied on.² Where the suit is against a mere stranger, for interfering with property levied on, who has no title thereto, the officer is not bound to show a judgment. His execution, with his indorsement thereon is sufficient.³ But if the sheriff has no prior possession, even an officious stranger may defeat the action by showing that the process was void, as having been issued upon a judgment obtained without jurisdiction.⁴ His indorsement of levy and possession is sufficient in the first instance, but where the process is impeached as void for any cause, if he would maintain his action on the ground of prior possession, he must show such possession by other evidence.⁵ If it appears clearly that the suit by the officer is for the benefit of the plaintiff, a valid judgment should be shown.⁶

§ 831. Where an action is brought by an officer against one who has converted or removed goods and chattels levied on, the measure of damages is the extent of the officer's lien upon the goods under his process. His title is special and he can only recover the amount of the execution or executions, under which the property was seized, to the extent of the value of the property, and not the full value of the property taken, if it exceeds the amount of such lien.⁷

§ 832. Where an officer holds an execution against one and he voluntarily pays the amount thereof to the plaintiff out of his own money, he cannot recover the sum so paid from the defendant without first showing a request by the defendant to pay the same. And so if he is compelled to pay an execution in consequence of his neglect to collect the same out of the defendant's property, he has no right of action against the defendant.⁸

§ 833. If the sheriff seizes goods under an execution as the property of the defendant, and sells the same and pays over to the plaintiff in the execution the proceeds thereof, and is afterwards sued by the

¹ 8 Wend. 445, *Spoor v. Holland*; 6 John. 195, *Barker v. Miller*; 10 Barb. 157, *Vanderpool v. Van Allen*; 7 Cow. 310, *Cornell v. Cook*; Allen 149; 16 Wend. 562, *Earl v. Camp*.

² 8 Wend. 445, *Spoor v. Holland*.

³ 6 John. 195, *Barker v. Miller*; 8 Wend. 445, *Spoor v. Holland*; 2 Sandf. 110, *Heath v. Westervelt*.

⁴ 8 Wend. 445, *Spoor v. Holland*; 2 Denio 643, *Dunlap v. Hunting*.

⁵ 16 Wend. 562, *Earl v. Camp*.

⁶ Cow. & Hill's Notes, 1079.

⁷ 8 Wend. 445, *Spoor v. Holland*; 7 Cow. 294, *Dillenbach v. Jerome*.

⁸ 1 Kern. 61 *Caroenter v. Stilwell*; Ante, § 422.

rightful owner, and there is a recovery had against him for the value of the goods so sold, such officer may recover from the plaintiff the amount actually paid to him on the execution. But the plaintiff is not bound to indemnify him against the recovery, nor the costs and expenses of the action, unless the levy was made by his special direction, and with a promise to indemnify the officer against the consequences thereof; or unless he has given a bond of indemnity to save the sheriff harmless.

§ 834. Where a prisoner escapes without the assent of the sheriff, he may recover against him the damages he has sustained in consequence thereof, whether he has taken a bond from such prisoner for the liberties of the jail or not; or the sheriff may retake the prisoner and detain him until he satisfies him for the damages he has sustained by reason of the escape.¹

§ 835. In every suit brought by a sheriff on a bond taken by him for the liberties of the jail, the defendants may plead a voluntary return of the prisoner to the jail from which he escaped, or the liberties thereof, or a recapture of such prisoner by the sheriff from whose custody he escaped, before the commencement of such suit, and may give evidence thereof in bar of such action; and such defendants shall be entitled to make such or any other defence to such suit, which might be made by such sheriff to an action against him for the escape.²

§ 836. But if an action shall have been brought against the sheriff for an escape, and due notice thereof shall have been given to such prisoner and his sureties who executed the bond for the jail liberties, the judgment against such sheriff shall be conclusive evidence of his right to recover against the prisoner and his sureties, to whom such notice was given, in the action on such bond, as to all matters which were or might have been controverted in the action against the sheriff.³

§ 837. In every such action brought by a sheriff on a bond executed for the jail liberties, if it shall appear to the court that judgment has been rendered against such sheriff for the escape of the prisoner, and that due notice of the pendency of the action against the sheriff has been given to such prisoner and his sureties, to enable them to defend the same, such court shall render judgment in the suit upon such bond, at the same term in which the writ by which such action shall be commenced, shall be returned served.⁴ But to entitle any sheriff to move for such judgment, he shall have filed his declaration, and shall show to the court that he had given twenty day's notice of such

¹ Sewell, 451.

² 3 R. S. 734, § 69.

³ 3 R. S. 734, § 70.

⁴ 3 R. S. 734, § 71.

motion.¹ If it shall appear, on the hearing of such motion, that the defendants have any meritorious cause of defence, which was not controverted in the action against the sheriff, and which by law could not have been so controverted, the court shall suspend proceedings on such judgment, until a trial in such action be had; but such judgment shall remain as security for the sheriff.² If the defence be established, the court shall vacate such judgment, and render judgment as in other cases.³

§ 838. In every action brought by a sheriff on such bond, the recovery of a judgment against him for the escape of the prisoner, shall be evidence of the damages sustained by him in the same manner as if such judgment had been collected; and the sheriff shall be entitled to recover the costs, and his reasonable expenses in defending the suit against him as a part of his damages.⁴

§ 839. If any such bond shall be forfeited, the party at whose suit the prisoner executing the same shall have been confined, or in case of his death, the executors or administrators of such party, shall be entitled to an assignment thereof, which shall be made by the sheriff taking the same, or in case of a vacancy in his office, by his under sheriff or the person acting in place of such sheriff, by indorsement on such bond, executed in the presence of one or more witnesses.⁵

§ 840. The party to whom such assignment shall have been made, may maintain an action on such bond, as assignee of the sheriff taking the same, in the same cases in which such action might be maintained by such sheriff; and upon obtaining judgment thereon, he shall recover damages for such breaches of the condition as shall have been assigned by him, as follows:

1. If the prisoner escaping was confined by virtue of an execution, or by virtue of an attachment for nonpayment of costs, the measure of the plaintiff's damages shall be, the amount directed to be levied by such execution or attachment, with interest thereon to the time of such recovery;

2. If such prisoner was confined by virtue of a *capias ad respondendum*, or upon a surrender in exoneration of his bail, made before or after judgment rendered against him, the plaintiff shall recover only the actual damages sustained by him.⁶

§ 241. The acceptance of an assignment of any such bond, shall be a bar to any action by or on behalf of the party receiving such assignment, against the sheriff or other officer making the same, for any

¹ 3 R. S. 734, § 72.

² 3 R. S. 734, § 73.

³ 3 R. S. 735, § 74.

⁴ 3 R. S. 735, § 75.

⁵ 3 R. S. 735, § 76; Ante, § 789.

⁶ 3 R. S. 735, § 77.

escape by the prisoner executing such bond, amounting to a breach of such bond.¹

§ 842. In every action brought by the assignee of such bond, the defendants shall be entitled to plead a voluntary return of the prisoner to the liberties of the jail, before the commencement of such action, in bar thereof, and to make any defence which they would be entitled to make, if such action had been brought in the name and for the benefit of the sheriff to whom such bond was executed.²

§ 843. In case the party at whose suit any person shall have been confined to the liberties of the jail, shall refuse or neglect to take an assignment of the bond executed by such person, and shall prosecute the sheriff for the escape of such person, the court in which such action shall be pending, shall, unless the escape shall have been committed with the assent, aid or assistance of such sheriff, by rule, stay all proceedings upon the judgment against such sheriff, until he shall have had a reasonable time to prosecute the bond taken by him, and to collect the amount of any judgment he may recover thereon.³

§ 844. The bail taken upon the arrest of a defendant under the provisions of the Code, shall, unless they justify when excepted to, or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.⁴ The mere neglect of the surety to justify does not give to the sheriff a right of action against such surety, but only where the sheriff sustains damages by such neglect; and hence after failure to justify and failure to make the execution out of the property or by the arrest of the defendant, the sheriff assigned his claim against the bail to the plaintiff, it was held that the sheriff having sustained no damages, the plaintiff could not recover.⁵ In such case, the liability of the surety to the sheriff is the same as to the plaintiff in the action if they had duly justified.⁶

§ 845. In all cases where a sheriff has taken a bond of indemnity, and the same is not void, he may maintain an action thereon whenever the condition thereof has become forfeited. If the bond is one of indemnity merely, no action can be maintained thereon, until the sheriff has become damnified within the condition of the bond. Thus, where the bond is conditioned to save the sheriff harmless against a levy or the like, it is not sufficient that there should be a recovery against him. It is necessary that the sheriff should have paid the judgment, or some part thereof, or the costs or expenses of the litiga-

¹ 3 R. S. 735, § 78.

² 3 R. S. 735, § 79.

³ 3 R. S. 735, § 80.

⁴ Code, § 203.

⁵ 44 Barb. 9, *Clapp v. Schutt*.

⁶ 7 How. 214, *In Re Taylor*.

tion. It is not sufficient that he should have incurred liability. And it has been held that a bond conditioned to indemnify and save harmless the sheriff from all costs, charges, and expenses which he should incur in defending a suit, was one of indemnity merely, and that no breach was incurred until actual payment by the party damnified.¹ But if the agreement of indemnity is to do some act, or to save the party from charge or liability, the condition is broken when there is a failure to do the particular act, or when such charge or liability is incurred; and it is not necessary in such case that the party should have actually paid anything.² Hence when the bond was conditioned against all damages, costs, charges, trouble and expense that the officer might be put to, sustain or suffer by reason of doing the act against which he was indemnified, it was held that an action might be maintained upon it as soon as liability was incurred and before any thing was paid or advanced by the officer; and that in an action upon such bond the officer might not only recover the amount actually expended in defence of an action brought against him for the act against which he was indemnified, but all liability or charges he had incurred.³ When a deputy holding an execution took a bond of indemnity running to his principal conditioned to indemnify the latter and all persons assisting him in the premises, it was held that an action might be brought in the name of the sheriff for the benefit of the deputy, without any assignment of the cause of action by the sheriff.⁴

§ 846. For a rescue on mesne process, the plaintiff may bring an action against the rescuers; but where the rescue is in execution, either the sheriff or plaintiff may bring an action, and in such action he must state and prove the judgment, and that the taking was lawful; for any person may lawfully resist an officer in the execution of void process, or his attempt to execute regular process at an improper time or place, or in an unlawful manner.⁵

§ 847. Whenever the sheriff is damnified by the acts of his under sheriff, deputy or jailer, he may maintain an action therefor against such under sheriff, deputy or jailer. Or, if they have given a bond to the sheriff, conditioned to save him harmless against their acts and neglect of duty, he may maintain an action against such under sheriff, deputy or jailer, and their sureties in the bond, whenever the conditions thereof shall have been broken.⁶ Thus, such under officers will

¹ 14 Barb. 202, *Scott v. Tyler*; 4 Wend. 306, *Campbell v. Jones*; 8 Wend. 452, *Chase v. Hinman*.

² 1 Com. 550, *Gilbert v. Wiman*; 8 Cow. 623, *Rockfeller v. Donnally*; 8 Wend. 452, *Chase v. Hinman*; 19 Wend. 423, *Webb v. Pond*; 6 Hill 324, *Aberdeen v. Blackmar*.

³ 44 Barb. 209, *Bancroft v. Winspear*.

⁴ 18 N. Y. 374, *Stilwell v. Hurlbert*.

⁵ *Watson*, 75; 4 Hill, 437, *Curtis v. Hubbard*.

⁶ 1 Wend. 16, *The People v. Dunning*; Allen 90; 1 Com. 550, *Gilbert v. Wiman*.

be liable to the sheriff for all damages, costs and expenses sustained by him in consequence of any act or neglect of duty on their part; as neglect or refusal to execute process; or for its improper execution in any manner; for neglect or refusal to seize the defendant or his goods, upon proper process, delivered to him for that purpose; neglect or refusal to take bail in a proper case, or taking insufficient bail; or for suffering an escape; for refusing or neglecting to pay over moneys collected on process, (which he is bound to pay over to the sheriff, though the latter should never be called on to pay it;') or moneys received by him upon the redemption of lands sold; or for the wrongful seizing of the goods of another; or of property exempt from levy or sale on execution; or for taking illegal fees. So the deputy and his sureties are liable to the sheriff for moneys received by him on voidable process, and if it be not avoided by the defendant, the sheriff is responsible to the plaintiff for the amount.² And where the sheriff held a senior execution and the deputy a junior one, and the latter sold goods under such execution, but refused to apply the proceeds to the payment of the senior execution, it was held to be a breach of his duty to the sheriff, and that he and his surety were liable on his bond to the sheriff.³ If the sheriff be attached for the default of the deputy, he may pay the money without defending, and recover against the sureties on the deputy's bond.⁴ But the proper course in such case is to give the deputy or his bail notice of the proceedings and an opportunity to defend, and any judgment against the sheriff in such case will be admissible in evidence to prove not only the liability of the deputy, but also the amount of such liability; though there are cases which hold that a recovery against the sheriff, where the deputy alone was served and not his surety, will bind the latter, on the ground that notice to the principal of joint obligors is notice to all.⁵ In an action on the deputy's bond for not paying over money, it is no defence that the deputy kept the money by the sheriff's leave, unless there was a valid discharge under seal.⁶ Nor will it be a defence in such case that before the alleged default the deputy became insolvent and that the surety requested the sheriff to remove him from office, but that he neglected to do so.⁷ But if in any case, the deputy acted under the sheriff's special direction and authority, neither he nor his surety are liable, as all discretion of the deputy was thereby excluded in the performance of the particular act. To exonerate the deputy,

¹ 43 Barb. 98, Willett v. Stewart.

² 1 Wend. 16, The People v. Dunning.

³ 5 Barb. 385, Rowe v. Richardson,

⁴ 9 Cow. 693, Andrus v. Bealls.

⁵ 6 Barb. 467, Kettle v. Lippe; Cow. & Hill's Notes, §22; 44 Barb. 327, Fay

v. Ames; 18 Barb. 9, Thomas v. Hubbell; S. C. 15 N. Y. 405; 2 Duer 449, Westervelt v. Smith.

⁶ 1 Sandf. 626, Hart v. Brady.

⁷ 9 Cow. 693, Andrus v. Bealls; 11 Wend. 28 Barnard v. Darling.

however, the instructions of the sheriff must be clear and explicit, and a communication of mere information and advice will not have that effect. To excuse the deputy, the directions of the sheriff must be such as to deprive him of all discretion in the matter.¹ The bond given by a deputy to the sheriff does not usually cover suits wrongfully commenced against the sheriff, unless it expressly so provide; but some act or omission of the deputy must be shown, of such a character that the sheriff would be legally bound to answer for it in damages.² The bail of a deputy are answerable only for a breach of his official duty, and not for want of any courtesy to his principal, nor for any act merely annoying or troublesome.³ Although where the sheriff is sued for the act of his deputy, he cannot show his return to be false, yet he may do so in an action brought by himself against such deputy or his sureties for making the return.⁴ Whether the sheriff will be entitled to recover against the deputy upon his bond before he has actually paid the liability incurred through the act or default of such deputy, will depend upon the conditions of such bond. If the bond be merely conditioned to save the sheriff harmless from all costs and damages he may be subject to by reason of the acts or defaults of the deputy, it will be necessary, to entitle him to recover, that there has not only been a recovery against him for some act or default of the deputy, but that he has paid money in consequence thereof. And it has been held that where the deputy's bond was conditioned that the sheriff should not sustain damage or molestation by reason of the acts or omissions of the deputy, or by reason of any liability incurred through such acts or omissions, that there was no breach of the bond until actual damage was sustained, and that a recovery against the sheriff was not a forfeiture of the bond. But if the bond is conditioned to save the sheriff harmless from a charge or liability, as it usually is, it is forfeited when such charge or liability is incurred.⁵

CHAPTER XLIII.

ACTIONS AGAINST SHERIFFS.

§ 848. The cases in which sheriffs are criminally liable for any neglect or misconduct in the discharge of the duties of their office, have been pointed out. But in addition to the special provisions of the statutes already given, it is further provided that where any duty is or shall be enjoined by law, upon any public officer, or upon any

¹ 15 Wend. 274, *Tuttle v. Cook*.

² 2 Hill 671, *Franklin v. Hunt*.

³ 5 Barb. 385 *Rowe v. Richardson*.

⁴ Ante, § 45.

⁵ 1 Com. 550, *Gilbert v. Wiman*.

person holding a public trust or employment, every wilful neglect to perform such duty, where no special provisions shall have been made for the punishment of such delinquency, shall be a misdemeanor, and be punished by imprisonment in a county jail, not exceeding one year, or by a fine not exceeding two hundred and fifty dollars, or by both such fine and imprisonment.¹ So any oppression of an officer in the execution of process, is indictable. And though an officer have a legal warrant for the arrest of one, yet if he combine with the complainant to extort money from the prisoner, by operating upon the fears of the accused, he will lose the protection of his warrant, and become liable to indictment as well as to an action for false imprisonment.² It is extortion to demand fees before they are due; as where an officer refuses to execute process until his fees are paid.³ But to render the sheriff criminally liable, the act complained of must have been done by him or by his express command; for though he is liable in a civil action for every neglect or misconduct in office of any of his subordinates, in the same cases, and to the same extent as if the act was done or omitted to be done by himself, yet he is not liable to indictment for the neglect or misconduct of his deputies. Thus, though there may be a recovery against him for the extortion of his deputy;⁴ or where the deputy suffers an escape, or commits any other misfeasance in his office, yet he cannot be held criminally to answer in any such case.⁵ Where the sheriff shall have been fined or imprisoned under the statutory proceeding to punish for contempts, for the act or neglect of duty for which he is indicted, the court before which a conviction shall be had on such indictment, shall take into consideration the punishment before inflicted, in fixing its sentence.⁶ An officer may be indicted for corruptly and unlawfully making a false return to process which it was his duty to execute.⁷

§ 849. The sheriff is civilly liable to the party aggrieved for any default, misconduct, or delinquency in his office, whether the act or default was committed or suffered by the sheriff himself, or by any deputy or other subordinate officer of such sheriff.⁸ To render the sheriff liable for the acts of his deputy, the acts complained of must have been done in the regular course of his official business.⁹ But if

¹ 2 R. S. 979, §§ 53, 55.

² 3 Wend. 350, *Holly v. Mix*; 5 Blackf. (Ind.) 237, *Jarrett v. Gwathmey*.

³ Sewell, 461.

⁴ 10 Barr (Penn.) 139, *Overholtzer v. McMichael*.

⁷ John. 35, *McIntyre v. Trumbull*; Watson, 37; 2 Ind. R. 207, *The State v. Berkshire*.

⁶ 3 R. S. 853, § 28.

⁷ 5 Wis. 696, *Tibbits v. The State*.

⁸ 2 McLean 193, *Clute v. Goodell*; 2 McLean 488, *Lawrence v. Sherman*; 18 Mo. 277, *Harrington v. Fuller*; 30 Vt. 697, *Mason v. Ide*; 37 Vt. 475, *Buck v. Ashley*.

⁹ 34 N. H. 261, *Perkins v. Pitman*; 46 N. H. 163, *Stevens v. Colby*.

the sheriff shall have been attached as for a contempt for the act complained of, and a fine shall have been imposed sufficient to indemnify such party, and to satisfy his costs and expenses, the payment and acceptance of such fine shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss.¹

§ 850. Every sheriff or other officer to whom any process shall be delivered, shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, which return shall be signed by him. For any violation of this provision, such sheriff or other officer shall be liable to an action at the suit of any party aggrieved, for the damages sustained by him, in addition to any other fine, punishment or proceeding which may be authorized by law.²

§ 851. The sheriff will be liable to an action at the suit of the plaintiff or his assigns,³ where he refuses or neglects to take the defendant or his goods on a writ directed and delivered to him for that purpose, where he has an opportunity to do so. In all such cases it is the officer's duty to make the necessary inquiries, to ascertain whether the defendant is within his county or not, and to arrest him before the return day of the process. Or, if the process be an execution or attachment against property, he is bound to make the like inquiries, to learn whether the defendant has property subject to such process. Such inquiries ought to be made at the residence of the defendant, or in the neighborhood; and the officer is not bound to make inquiries elsewhere, unless he has reason to believe that the defendant may be found elsewhere in the county, or that he has property in another place within the county. The plaintiff in the process is under no obligation to give the officer any information, yet if he improperly withholds any necessary information from the officer when inquiry is made, that fact may be given in evidence in mitigation of damages; and if the plaintiff intentionally gives wrong information for the purpose of leading the officer astray, it will be a good defence to any action by such plaintiff for not making the arrest or seizing the defendant's goods.⁴

§ 852. Where the action is for not serving mesne process, the plaintiff must prove the cause of action; for which purpose any evidence is competent which would be admissible in a suit against the debtor. Hence the acknowledgment of the debtor that the debt is justly due, is admissible against the sheriff. If it is final process against one, the

¹ 3 R. S. 853, § 21.

² 3 R. S. 739, § 98.

³ 38 Barb. 18, *Dinny v. Fay*.

⁴ Sewell 437; 10 Wend. 367, *Hinman v. Borden*.

production of a certified copy of the judgment record will be necessary. He must also prove the issuing of process whether it be mesne or final, and the delivery of it to the sheriff. If it be returned, the proof is by a certified copy; if not, its existence must be established by secondary evidence; and if it is traced to the officer's hands, he should be served with notice to produce it. And here, and in all other cases where the issuing of process is alleged, the allegation must be precisely proved or the variance will be fatal. Some evidence must be given of the officers ability to execute the process; such as that he knew or ought to have known, that the person against whom he held the process was within his county; or that goods which he might and ought to have attached were in the debtors's possession; or that he had a knowledge of such facts as should cause him to make exertions to find property.¹ The averment of neglect of official duty, though negative, it seems ought to be supported by some proof on the part of the plaintiff, since a breach of duty is not presumed; but from the nature of the case very slight evidence will be sufficient to devolve on the defendant the burthen of proving that his duty has been performed. That damages will at least be nominal, whenever any breach of duty is shown; and may be increased according to the evidence.² When he neglects to levy and return an execution, it appearing that the defendants or some of them had sufficient property out of which he might have satisfied the execution, he is liable *prima facie* for the whole amount due on the judgment, and it is no answer that the defendant is still able to pay.³ And it has been held that he is *prima facie* liable without showing that the defendant had property to satisfy it.⁴ Where there is a levy on property and it is replevied from him in which he obtains a judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff to replevin, without indemnity from the plaintiff in the execution, and the failure to indemnify him will be no defence to an action for not returning the execution, and he cannot sustain an action for the expenses in the replevin suit, though within the provisions of the indemnity bond.⁵ When a right of action has accrued against the sheriff for not collecting and returning an execution, it is not divested by an appeal being taken from the judgment by the defendant, even though the appeal be brought prior to the commencement of the action.⁶ When the sheriff

¹ 20 Mo. 116, *Taylor v. Wimer*.

² 2 Greenl. Ev. § 584.

³ 1 Hill 275, *Bank of Rome v. Curtis*.

⁴ 6 Hill 550, *Pardee v. Robertson*; 3 Seld. 550, *Ledyard v. Jones*, 21

N. Y. 481, *Swezey v. Lott*; 30 Ill. 339, *French v. Snyder*.

⁵ 21 N. Y. 481, *Swezey v. Lott*; 17 Wend. 543, *Patterson v. Westervelt*.

⁶ 29 Barb. 69, *Bowman v. Cornell*.

is sued for not collecting an execution, it is a question for the jury to say whether the defendant was a insolvent or not.¹

§ 853. In defence of actions of this description, where the suit is for neglecting to seize goods, the sheriff may show that the property did not belong to the debtor,² or was exempt from levy and sale; or that there were reasonable doubts as to the ownership, and that the plaintiff refused to indemnify him for taking them;³ or that on inquest of title, the same was found out of the judgment debtor; that the same was mortgaged, and that the judgment debtor had not the right of possession; that the mortgagee had taken possession; or that by the condition of the mortgage the title of the mortgagee had become absolute, whether he had taken possession or not; or that the property had been let to hire, and that the period for which it was so hired had not expired at the return of the execution. The sheriff may release a levy at any time he finds that the property does not belong to the defendant and return *nulla bona*; but in such case the burthen of proof will be on him to show the fact.⁴ He may show that the plaintiff's judgment was founded on fraud; first, showing that he has legal process in his hands of another judgment creditor; or that the judgment is void and that the execution had become dormant in his hand by reason of instructions by the plaintiff to delay.⁵ Or that the plaintiff or his attorney had assented to delay.⁶ He may also show that there were other liens on the property; so he may show that after the levy and sale, he had been sued for the property and a recovery had against him for the value thereof; that the goods were rescued from him,⁷ and that after the levy, they were lost or destroyed, without negligence or default on his part; but this will not be a good defence unless the sheriff took the property into his possession. Nothing but the act of God, or of the public enemies will excuse him, where he leaves the property with the defendant, or with a receiptor.⁸ And where he has left the property with a receiptor who claimed to be and was the owner and afterwards the sheriff recovered against him on his receipt, the sheriff was held estopped from showing that the property did not belong to the defendant, when sued by the plaintiff.⁹

¹ 24 Barb. 278, *Humphrey v. Hathorn*.

² 16 Pick. (Mass.) 556, *Canada v. Southwick*; 6 Dana (Ky.), 443, *Reed v. Booker*; 2 Har. (N. J.) 299, *Hopkins v. Chandler*; 8 Ind. 533, *Hutchins v. Hanna*.

³ 18 N. Y. 115, *Chamberlain v. Beller*; 2 Pick. (Mass.) 975, *Marsh v. Gold*.

⁴ 23 How. 124, *Blivin v. Bleakly*.

⁵ 11 John. 110, *Storm v. Woods*; 2 Wend. 419, *Hikok v. Coates*; 15 John. 428,

Farrington v. Sinclair; 5 Hill 377, *Knower v. Barnard*.

⁶ 24 Barb. 278, *Humphrey v. Hathorn*.
⁷ 12 John. 207, *Hoyt v. Hudson*; 16 Wend. 335, *Miller v. Adsit*.

⁸ 5 Denio 586, *Browning v. Hanford*; 27 N. Y. 234, *Moore v. Westervelt*.

⁹ 25 N. Y. 302, *The People ex rel. Knapp v. Reeder*; 27 Maine 345, *Penobscott Boom Co. v. Watkins*; 38 N. Y. 253, *Cornell v. Dakin*.

§ 854. By the provisions of the Code, it is declared that if the bail, on arrest, do not justify, when excepted to, or other bail be not given, who shall justify, the sheriff shall be liable as bail, and an action may be maintained against him under the same circumstances as against the bail, on the default of the principal to comply with the conditions of the undertaking.¹ The sheriff becomes bail officially, not individually, and his sureties on his official bond are liable for any default of the sheriff as bail.² But it will be a good defence that the defendant has surrendered himself before action, or has been retaken by the sheriff; or that the sheriff has given new bail, who have justified. And so if the process was absolutely void;³ or the defendant was exempt from arrest.⁴ And, as has been seen, if on the return of execution duly issued upon any judgment obtained on any bond taken by the sheriff on the arrest of one under an attachment as for a contempt, it shall appear that the sureties taken therein were at the time of taking them, insufficient and that the officer receiving them had reasonable grounds to doubt their sufficiency, he shall be liable in an action on the case, to the party aggrieved, who may have prosecuted such suit, for the amount of the judgment recovered by him, and for his costs and expenses in such suit; or if such suit was brought by the attorney general, or a district attorney, an action on the case may in like manner be brought by them, in the name of the people of this state, for the amount of the judgment so recovered.⁵ When sued in such case, the sheriff may show that such sureties were at the time apparently responsible and in good credit; or that he exercised a reasonable and sound discretion in deciding upon their sufficiency, of which the jury are to judge. But their own statement to the sheriff as to their responsibility is not sufficient, though they are competent witnesses for him on the trial. On the other hand it may be shown that the sheriff had notice of their insufficiency, or did not act with due caution, under the circumstances; or that their pecuniary credit was low in their own neighborhood.⁶

§ 855. When the sheriff seizes goods under process, he is bound to exercise ordinary diligence in taking care of them, and if he keeps them in an unsafe place or exposes them to destruction, and they are lost or destroyed, he will be liable for the damages sustained thereby. And so if he negligently injures the property levied on. If he leaves the property in the hands of the debtor, though he take a receipt therefor from another person, nothing will excuse him but the act of

¹ Code, § 201; 31 Barb. 62, *Metcalf v. Stryker*; S. C. 31 N. Y. 255.

² 4 Keyes 93, *The People ex rel. Metcalf v. Dikeman*

³ 31 N. Y. 90, *Carpenter v. Willett*.

⁴ 9 Mo. 784, *The State v. Hamilton*.

⁵ 3 R. S. 854, § 32.

⁶ 2 Greenl. Ev. § 586.

God or the public enemies, not even the destruction of the property by fire. If, however, he takes the property into his possession, he will be excused, if he shall have bestowed upon it such care as a prudent man would take of his own property, though it be lost or stolen or destroyed by fire. So too the plaintiff in an execution or attachment will have no right of action against the sheriff where the property is left with the defendant by his direction, or with a receiptor of his selection. Where property levied on is lost or destroyed, the sheriff's return of that fact to the process will not be evidence for him in any action against him therefor. Such fact must be proved in the ordinary way.¹

§ 856. The sheriff is liable to the plaintiff in an action for moneys collected by him on execution, which he refuses or neglects to pay over.² So an action may be maintained against him for money collected upon an execution directed to the sheriff of another county. He might have refused to execute it, but having received the money upon it, he is bound to pay it over to the plaintiff.³ So too, he is responsible for money received by his deputy on erroneous process, and in an action against him he cannot avail himself of the defects in the execution, or that it was improperly issued.⁴ An action for the nonpayment of money in such case, may be brought against the sheriff without demand first made, or notice to him to return the execution, immediately after the return day thereof, but not before, though the money may have been received by the sheriff before the return day. If a deputy receives an execution, and is afterwards appointed sheriff, and then realizes the money on the execution, it is received by him as deputy and not as sheriff, and the former sheriff will be liable to an action therefor, and not the bail of such new sheriff.⁵

§ 857. Where the action is for not paying over money collected, the evidence on the part of the plaintiff consists of proof of the receipt of the money by the officer, under the process, and where a demand is requisite, that it has been demanded. The most satisfactory proof of the receipt of the money is the officer's return on the execution; which is shown by a certified copy, if it has been returned, and by secondary evidence if it has not. The return is conclusive evidence against the sheriff that he has received the money; but it does not

¹ Ante, § 448; 27 N. Y. 234, *Moore v. Westervelt*.

² *Sewell* 436; 6 Cow. 465, *Armstrong v. Garrow*; 21 Wend. 264, *Newland v. Baker*; 7 Hill 198, *Shepard v. Hoit*

³ 15 Wend. 575, *Walden v. Davidson*.

⁴ 1 Wend. 16, *The People v. Dunning*; 3 Seld. 195, *Bacon v. Cropsey*.

⁵ 19 Wend. 482, *The People ex rel. Bacon v. McHenry*.

prove, nor will it be presumed, that the money has been paid over to the creditor.¹

§ 858. In the defence of an action for this cause, the sheriff may show as in all other cases, when sued by the plaintiff, that the process was absolutely void, though it will not be sufficient that it was irregular, and voidable merely. He may also show that the money sought to be recovered was made out of the goods of a stranger, and not those of the defendant, to whom the officer is liable.² And the fact that the plaintiff had given the sheriff a bond of indemnity, against the levy and sale thereof, and had sued thereon will not vary his rights.³ So, it will be a good defence that the defendant had at the time become bankrupt, and that the goods belonged to his assignees; and this will be so though he has made return that he has collected the money out of the goods of the debtor. He may also show that the plaintiff had directed him to apply the money to another purpose, which he had accordingly done.⁴

§ 859. Where process is returnable by a day certain, as an execution, or a judge's order for the arrest of a defendant or the like, it is the officer's duty to make return thereof by such return day, or an action therefor may at once be brought against him; and it will be no defence that he has not been ruled to return the same.⁵ If there be no return day named in the process, or paper, nor any time prescribed by statute, an action may be maintained against the sheriff, if he shall neglect to make such return, after having been duly notified to do so, according to the rules and practice of the court. Where the action is for neglect to return process alone, and not also for neglect to pay over money collected on execution or the like, the plaintiff will be entitled to recover nominal damages, on proof of the neglect complained of, and also his actual damages to the extent of the loss or injury sustained by him by reason of such neglect or refusal. It would seem too, that a sheriff was liable to nominal damages for not returning an execution in the hands of his deputy, after due notice, where by the interference of the plaintiff the sheriff may be released from liability as to the manner of its execution, or for any money the deputy may have collected thereunder.⁶

§ 860. In an action for an escape, the plaintiff must prove his character of creditor; the delivery of the process to the officer; the

¹ 2 Greenl. Ev. § 587; 3 Seld. 453, *Sheldon v. Payne*; 5 Wend. 207, *Townsend v. Olin*; 6 Cow. 465, *Armstrong v. Garrow*.

² 7 Wend. 259, *Every v. Edgerton*; 21 Wend. 264, *Newland v. Baker*.

³ 21 Wend. 264, *Newland v. Baker*.

⁴ 2 Greenl. Ev. § 588.

⁵ 15 John. 456, *Bark v. Campbell*; 3 Hill 552, *Corning v. Southland*.

⁶ 1 Denio 548, *Mickles v. Hart*.

⁷ 2 Greenl. Ev. § 589.

arrest; the escape, and the damages or debt. If the escape was after judgment, his character of creditor is proved by a copy of the record; and where the action is debt, the plaintiff is entitled to recover the amount of his judgment without deduction or regard to the circumstances of the debtor. But if it be trespass on the case, as it must be where it is for an escape on mesne process, and it may be where the arrest was upon execution, the plaintiff must prove his debt in the manner stated, in actions for not serving process. The process must be proved precisely as alleged, a material variance being fatal. The delivery of the process to the officer will be proved by his return, if it has been returned, or by any other competent evidence if it has not. The return of *cepi corpus* will be conclusive evidence of the arrest; and if there has been no return, the fact of arrest may be proved by parol. The escape is proved by any evidence that the debtor has been seen at large after the arrest, for any time, however short, and even before the return of the execution. But otherwise, if it be on mesne process. It will be no defence to an action for an escape that the sheriff allowed the prisoner to leave the jail at the request of the plaintiff's attorney if the sheriff is aware, or has reason to know that the judgment is not actually paid.¹ But the attorney of record may acknowledge satisfaction of a judgment, and if the sheriff has no knowledge that the authority of the attorney has been revoked it will be a good defence to an action for an escape when the prisoner is discharged, or leaves the limits after such satisfaction piece has been filed and entered upon the docket.² A forged satisfaction piece entered on the docket, but not entered on the judgment roll, was held not to be a justification of an escape where the sheriff did no act under it, but the defendant being on the limits left of his own accord.³ Whenever a third person directs the discharge of a party from arrest, his authority to do so must be clear and explicit.⁴ Where a judgment is for costs alone, and it so appears on the face of the execution, it has been held no excuse to the sheriff who suffered the prisoner to go at large by consent of the plaintiff without knowledge of the attorney.⁵ And where there was a judgment for a penalty, one half of which went to the informer, it was held that it was an escape if the sheriff allowed the prisoner to go at large, by direction of the plaintiff, without payment of the people's moiety.⁶ It is no defence to the sheriff that a prisoner is discharged by a court or officer without authority to do

¹ 6 John. 51, *Crary v. Turner*; 10 John. 220, *Kellogg v. Gilbert*.

² 3 R. S. 640, § 22.

³ 7 Wend. 35, *Lownds v. Remsen*.

⁴ 6 John. 51, *Crary v. Turner*.

⁵ 4 Barb. 47, *Wilkins v. Batterman*.

⁶ 11 John. 474 *Minton v. Woodward*.

so.¹ But if the court has jurisdiction of the matter it will be immaterial if the proceedings are irregular, and hence the discharge of a prisoner on habeas corpus by a supreme court commissioner, though erroneous was held a bar to an action for an escape.² It will be a good defence if the judgment or process is void.³ But an irregularity which does not render the process void, but voidable only, will not excuse an escape.⁴ Nor will error in the judgment be a defence;⁵ nor that the plaintiff was not entitled to the judgment.⁶ But he may show that the defendant was not liable to arrest.⁷ Where one is arrested on void process, and other process is delivered to the sheriff at the suit of the same party, it will be a good defence when sued for an escape on the latter process, that the process was void. But if the arrest is only irregular it will be no defence to an action by another party where the process is placed in the hand of the sheriff while the defendant is so under arrest, unless there is collusion between the parties.⁸ It is a good defence to an action for an escape on mesne process if the sheriff have the prisoner at the return day of the writ.⁹ But it is otherwise on final process,¹⁰ unless the escape was without the knowledge or consent of the sheriff, in which case it will be a good defence that the sheriff has the prisoner in the jail or within the limits before action is brought against him.¹¹ If the prisoner escaped with the knowledge or consent of the sheriff, his retaking him before suit will not be a defence unless the plaintiff consent or affirm the arrest.¹² And the assent of the plaintiff subsequent to an escape, to the defendants leaving the limits, will not be a good defence.¹³ It will not be a good defence if the jail is broken open by a mob and the prisoner liberated;¹⁴ but it will be if he is liberated by foreign and public enemies, or by a fire in the jail, or the act of God. It was held a good defence where the plaintiff seeing the defendant off the limits on Sunday held out inducements to him to remain off until Monday, with intent to bring suit against the sheriff for the escape

¹ 5 John. 115, *Jackson v. Smith*; 9 John. 146, *VanSlyck v. Taylor*; 15 John. 152, *Cable v. Cooper*; 8 Wend. 545, *Ames v. Webbers*; 5 Barb. 273, *Bush v. Pettibone*; S. C. 4 Com. 300.

² 3 Barb. 37, *Wiles v. Brown*.

³ 2 Denio 646, *Dexter v. Adams*; 31 N.Y. 90, *Carpenter v. Willet*; S. C. 28 How. 225; 1 Root (Conn.) 288, *Austin v. Fitch*.

⁴ *Watson* 139; 13 John. 529, *Hinman v. Brees*; Id. 378, *Scott v. Shaw*; 4 Cow. 158, *Ross v. Luther*; 6 How. 73, *Hutchinson v. Brand*; S. C. 5 Seld. 208; 8 Cow. 192, *The President, &c., of Ontario Bank v. Hallet*.

⁵ 6 How. 73, *Hutchinson v. Brand*.

⁶ 3 Com. 331, *Wesson v. Chamberlain*.

⁷ 13 Wend. 68, *Phelps v. Barton*; 11 John. 433, *Ray v. Hogeboom*; 1 Keyes 510, *Carpenter v. Willett*.

⁸ *Watson*, 91.

⁹ 5 John. 182, *Stone v. Woods*; 6 John. 62, *Olmsted v. Raymond*; 10 Wend. 514, *Arnold v. Steeves*.

¹⁰ 6 Hill 344, *Clark v. Cleveland*; 15 John. 256, *Thompson v. Lockwood*; 4 John. 45, *Tillman v. Lansing*.

¹¹ 3 R. S. 736, § 84.

¹² 3 Com. 331, *Wesson v. Chamberlain*;

¹³ 16 John. 181, *Sweet v. Palmer*; 7 Cow. 274, *Powers v. Wilson*.

¹⁴ *Watson*, 140.

before he could return.¹ And so where the agent of the creditor sought by artifices to induce the debtor to escape.² It has been held that the fact that there was no jail was no defence.³ And also that the incapacity of the jail was no excuse to the sheriff.⁴ Allowing the prisoner to be taken from the custody of the sheriff by other process is no defence; but it has been held otherwise where the prisoner was taken by the sergeant at arms of the house of Representatives of the United States and carried to Washington.⁵

§ 861. In an action for a false return to mesne process, the plaintiff must prove the cause of action, the issuing of the process, and the delivery of it to the officer, in the same manner as in actions for not serving mesne process. If the alleged false return be to an execution, the plaintiff must show a valid judgment;⁶ and the issuing of the execution. The return must be shown, in either case, and some evidence must be adduced of its falsity, where it is not admitted. Slight evidence to this effect will be sufficient to put the sheriff upon proof of the truth of the return, as in case of an execution, by showing that the debtor was in the possession of goods and chattels, without proving the property to be in him. If the process was against several, and the allegation is that they had goods which might have been seized, the allegation being severable, will be supported by proof that any one of them had such goods.⁷ Bail affected by a false return may bring an action against the sheriff making it.⁸ But no action will lie in favor of a party who directs what return to be made.⁹

§ 862. In defence of such action, the sheriff may show that the judgment was void; but not that it was merely voidable;¹⁰ that the plaintiff assented to the return after being informed of all the circumstances; or where part only of the money was levied, that the plaintiff accepted it with intent to waive all further remedy against the sheriff, and with full knowledge of the facts; or that the plaintiff has lost his priority, by ordering the levy of his execution to be stayed, another writ having been delivered to the sheriff; or that the first levy for not returning which the action is brought, was fraudulently made, and so void; or that the plaintiff's judgment was entered up by fraud and collusion with the debtor, the sheriff first proving that he represents another creditor of the same debtor, by showing a legal precept in his hands. He may also show that the goods were absorbed by a

¹ 10 Wend. 356, *Van Wormer v. Van Voast*.

² 2 Denio 646, *Dexter v. Adams*.

³ 2 O. R. 348, *Brown Co. v. Butts*.

⁶ O. R. 13, *Richardson v. Spencer*;
13 O. R. 177, *Kepler v. Barker*.

⁵ 9 How. 93, *Brown v. Tracy*; 21 How. 40, *Wickelhausen v. Willett*.

⁶ 3 Denio 45, *McDonald v. Bunn*.

⁷ 2 Greenl. Ev. § 592.

⁸ 46 Barb. 423, *McArthur v. Pease*.

⁹ 5 Blackf. (Ind.) 467, *Bohen v. The State*.

¹⁰ 3 Seld. 195, *Bacon v. Cropsey*.

prior execution in his hands; and in such case the plaintiff may rebut this evidence by proving that such prior execution is fraudulent, and that the sheriff had previous notice thereof, and was required by the plaintiff not to pay over the proceeds to the prior creditor. He may also prove that the debtor had previously become bankrupt. And if the assignees are the real defendants, the plaintiff may give in evidence the petitioning creditor's declarations in disparagement of his claim, though he has not been called as a witness by the defendant.¹ Where the defence is an illegal assignment and sale by the debtor, the plaintiff may prove the sale fraudulent. So if the sheriff defends his return on the ground that the debtor was an ambassador's domestic servant, the plaintiff in reply may show that his appointment was colorable and illegal. And where he has taken an inquisition of a jury, and the property has been found out of the judgment debtor, it is conclusive in his favor in an action for a false return of *nulla bona*, where he acts in good faith;² but it is no justification, and is only admissible in mitigation of damages in an action of trespass, by the true owner of the goods, for illegally taking them.³ The fact that the process is void or voidable, it has been held could not be set up as a defence to an action for a false return.⁴

§ 863. As has already been seen, the sheriff may refuse to execute void process; or he may stop its execution on discovering that it is void; and the fact that it is so void will be a good defence to any action for such neglect or refusal.⁵ But it is otherwise with process which is merely voidable, and not absolutely void.⁶ In the former case, the process is no protection to the officer who executes it, but in the latter it is a complete justification to the officer, until it is set aside by the party. One reason why the sheriff shall not take advantage of the error in issuing the process is, that for aught that appears the party does not wish to avail himself of it.⁷ Thus it has been held, that though an execution issued before the expiration of the thirty days after the docketing of the judgment, as prescribed by statute, that fact could not be taken advantage of by the sheriff, in an action for a

¹ 2 Greenl. Ev. § 593.

² 8 John. 185, Bayley v. Bates; 10 John. 98, Townsend v. Phillips; 15 John. 147, Van Cleef v. Fleet; 7 Wend. 236, Platt v. Sherry; 8 Cow. 65, Curtis v. Patterson.

³ 2 Greenl. Ev. § 594.

⁴ 23 How. 124, Blivin v. Bleakley.

⁵ Ante, §§ 283, &c.; 16 Wend. 562, Earl v. Camp; 7 Hill 35, Cornell v. Barnes; 2 Cow. Tr. 520; 3 Seld. 195, Bacon v. Cropsey; Watson, 53; Sewell, 99, 100.

⁶ 1 Cow. 300, Jones v. Cook; 4 Cow. 158, Ross v. Luther; 8 Cow. 192, Ontario Bank v. Hallett; 3 Seld. 195, Bacon v. Cropsey; 2 Barb. 309, Berry v. Riley; 3 Barb. 17, Dominick v. Eacker; 12 Wend 96, Parmelee v. Hitchcock; 3 Hill 469, Stone v. Green; 3 Sandf. Ch. 110, Green v. Burnham; 3 Barb. Ch. 184, Pierce v. Alsop; 8 Paige 469, Williams v. Hogeboom.

⁷ 3 Seld. 195, Bacon v. Cropsey; 8 Wend. 545, Ames v. Welbers.

false return; nor the fact that the whole amount directed to be collected on the execution was not due.' A constable or his surety cannot avail himself of an omission by the justice to comply with the requirements of the statute in relation to the mode of entering judgment by confession when sued for not executing process.² Process returnable on Sunday is voidable and not void,³ and that fact will not excuse neglect to execute it.

§ 864. The sheriff is liable in an action at the suit of the defendant in the process, for arresting him or seizing his goods under void process, but not if the process is voidable, and may be amended; or for seizing property exempt from levy and sale on execution.⁴ Where he is sued for levying on exempt property and the defence is that the judgment was recovered on a note for the purchase price of such property, the sheriff must set up this in his answer, or he will not be permitted to show it on the trial.⁵ So if he arrest one, or seize his goods, out of his jurisdiction, unless after escape or fraudulent removal of the goods after a levy; or where the arrest and seizing the goods is made at an improper time or place, as on Sunday, or in the dwelling of the defendant, where the officer has entered against the wishes of the occupant. So he will be liable to the defendant, if, after arrest, he refuses to take bail in a proper case, where there is a tender to him of sufficient sureties. It will be no answer that the defendant did not tender a bond; the sheriff is to prepare it.⁶ Where there is any abuse in the execution of process, trespass will lie against the sheriff.⁷ And so he is liable for an excessive levy;⁸ and for the value of the goods he may sell over sufficient to pay the debt and costs and fees.⁹ He will be liable for any negligence by which the property is lost or destroyed or squandered.¹⁰ But he will not be liable in such case to a mortgagee, whose mortgage is subsequent to the judgment, and by means of such loss, the execution had to be satisfied out of the defendant's lands, thereby reducing the mortgagee's security by the amount of the personal property so lost, unless it was fraudulently done by the sheriff to diminish the security of the mortgagor's creditors.¹¹ He is liable to the defendant for any surplus over any execution in his hands, unless there are other judgments against the defendant, and the officer has paid the money into court. If a wrongful levy is made by the order of the plaintiff, he and the

¹ 3 Seld. 195, *Bacon v. Cropsey*.

² 3 Wend. 282, *Germon v. Swartwout*.

³ 1 Barb. Ch. 273, *Boyd v. Vanderkemp*;
5 Paige 541, *Gould v. Spencer*.

⁴ 22 Barb. 656, *Smith v. Hill*.

⁵ 54 Barb. 411, *Dennis v. Snell*.

⁶ *Sewell*, 455.

⁷ 5 John. 125, *Rogers v. Brewster*.

⁸ 3 Hill 215, *Dezell v. Odell*.

⁹ *Sewell*, 254.

¹⁰ 9 John. 381, *Jenner v. Joliffe*.

¹¹ 17 Wend. 534, *Bank of Rome v. Mott*.

officer are both trespassers.¹ And so any one who directs or indemnifies against a wrongful levy is a trespasser.² Property exempt from execution cannot be levied on, but the defendant may turn it out upon execution, and if he should do so he cannot afterwards maintain an action therefor;³ unless in case the judgment, or some part thereof, was for the sale of intoxicating liquors, when any levy and sale of exempt property, even with the consent of the defendant is declared void.⁴

§ 865. An action will lie against the sheriff for any unlawful intermeddling with the rights or the property of a third person, or the exercise or dominion over it in defiance or to the exclusion of the owner, as where he arrests one under the supposition that he is the person against whom he holds process or the like, or where he seizes the property of one under process issued against another. And he will be a trespasser where he merely levies, though there is no manual interference or actual possession.⁵ And a sale by an officer of property belonging to another, as where he sells sheep, which are in a large field, and no actual possession is taken or removal made, it is trespass, and an action will lie against him therefor.⁶ But where the officer is sued in such case, he may show in mitigation of damages, that the property was subsequently taken out of his custody and applied to the satisfaction of legal claims thereon.⁷ But the sheriff will not be liable to such action at the suit of a third person, where the goods are mingled with those of the debtor, so that they cannot be distinguished until the owner points them out and demands them.⁸ Under the old form of proceedings in replevin, it was questionable whether the sheriff was liable to a stranger for taking his goods, where he was commanded to take the specific goods by the process.⁹ It would seem however that he is not so liable under the substituted proceedings under the Code. If the proceedings are in due form, and the property is in the possession of the defendant, or of his agent, and the proceedings of the sheriff are regular in taking possession of the property, no party can have cause of action against him, though the defendant should not own the property, unless a claim thereto was in due time and in due form interposed. Perhaps after such claim is

¹ 10 Wend. 349, *Allen v. Crary*; 6 Barb. 79, *Stewart v. Wells*.

² 15 Wend. 631, *Fonda v. Van Horne*; 5 Denio 92, *Davis v. Newkirk*.

³ 16 Wend. 562, *Earl v. Camp*.

⁴ 2 R. S. 946, § 35.

⁵ 7 Cow. 735, *Wintringham v. Lafoy*; 8 Wend. 610, *Phillips v. Hall*; 6 Barb. 79, *Stewart v. Wells*.

⁶ 8 Barb. 213, *Neff v. Thompson*.

⁷ 2 Hill 204, *Sherry v. Schuyler*.

⁸ 8 Pick. 441, *Shumway v. Rutter*; 6 Cal. 44, *Daumiel v. Gorham*; 12 Cal. 476, *Wellington v. Sedgwick*; 12 Cal. 495, *Paige v. O'Neil*.

⁹ 4 Denio 446, *Shipman v. Clark*; 14 Barb. 506, *Stimpson v. Reynolds*.

interposed he will become liable to the owner if he should deliver the property to the plaintiff in the action. In such case he will have his remedy over upon the undertaking. The sheriff will not be liable to an action at the suit of the mortgagee, for seizing, selling, and delivering to the purchaser, goods mortgaged, upon an execution against the mortgagor, when by the terms of the mortgage he has the right of possession of the mortgaged property for a definite period.¹ But it is otherwise if the mortgagor has not the right of possession for a definite period.² Nor will the sheriff be liable to the lessor of goods for selling them as the goods of the lessee, particularly before the expiration of the period.³ In order to maintain an action against the sheriff, the party must, at the time, have the right of possession of the property.⁴ Where property comes rightfully into the hands of the sheriff it must be demanded before suit.⁵

§ 866. Where the sheriff is sued by the defendant in the action in which the process issued, for acts done thereunder, as levying on exempt property and the like; it is not necessary for him in justifying under such process, that he should show a judgment,⁶ nor, in the case of a stranger bringing an action who has no title.⁷ Where the process is valid on its face, its production is all that is necessary to justify the officer and all those acting in his aid in making an arrest. And where, in such case, the party alleges that more force was used than was necessary, it is for him to show it.⁸ But if a stranger sues, who shows title anterior to the levy, and good as against the defendant in the execution, then the sheriff can only justify by showing the judgment, for he can only defend himself by attacking such title as void for fraud in respect to creditors.⁹ And if the process is an attachment, he must show that the parties at whose suit it issued, were creditors of the defendant therein.¹⁰ Where the officer justifies under a writ, he must set it forth, and he must show that he substantially pursued his authority. If the court out of which the writ issues has jurisdiction, although the proceedings are irregular, yet the writ is a sufficient justification to the sheriff, even if set aside afterwards for the irregularity. An execution paid will protect the officer, but not the party or his attorney.¹¹ And a ministerial officer will be

¹ 1 Kern. 501, *Hull v. Carnley*.

² 1 Com. 295, *Mattison v. Baucus*.

³ 2 Cow. 543, *Van Antwerp v. Newman*.

⁴ 1 Kern. 501, *Hull v. Carnley*.

⁵ 39 Barb. 573, *Hicks v. Cleveland*; 55 Barb. 389, *Shaw v. Davis*.

⁶ 12 John. 395, *Holmes v. Nuncaster*; 5 Wend. 170, *Savacool v. Boughton*;

23 Wend. 480, *Jansen v. Acker*; 16 Barb. 268, *Henry v. Lowell*.

⁷ Cow. & Hill's Notes 1079.

⁸ 16 Barb. 268, *Henry v. Lowell*.

⁹ 16 Wend. 514, *Parker v. Walrod*; 23 Wend. 480, *Jansen v. Acker*; 5 Hill 194, *Noble v. Holmes*.

¹⁰ 16 Barb. 502, *Cross v. Phelps*.

¹¹ 5 Hill 242, *Deyo v. Van Valkenburgh*.

protected in the execution of process if regular, and legal on its face, though he has knowledge of facts rendering it void for want of jurisdiction.¹ In justifying under process, whether mesne or final, it is not necessary to show it returned.² Where it is returned it may be proved by a certified copy. In the case of a constable, the execution is proved by the docket of the justice, or of a transcript therefrom.³ Although the statute requires the sheriff to endorse upon the execution the time of the receipt, yet if he fails to do so, he may show the fact by parol. The statute is merely directory.⁴

§ 867. Where the action against the sheriff is for taking the goods of a stranger, either on execution or attachment, it is competent for him to show that the title of the claimant is fraudulent as against the creditors of the debtor.⁵ If the plaintiff has never had possession, so that the sale was incomplete, for want of delivery, the proof of this fact alone will suffice to defeat the action. But if the transaction was completed in all the forms of law, and is assailable only on the ground of fraud, the sheriff must first show that he represents a prior creditor of the debtor; and this is done by any evidence which would establish this fact in an action by the creditor against the debtor himself, with the additional proof of the process in his hands, in favor of that creditor, under which the goods were seized. This evidence has already been considered in the case of actions for not executing process for an escape. Where the issue is upon a fraudulent conveyance by a debtor, his declarations made at the time of the conveyance are a part of the *res gestæ*.⁶

§ 868. In an action for the unlawful taking by color of his office, either money or other valuable thing for services, beyond what he is entitled to recover, the plaintiff must prove the process, and if it be an execution, the act of extortion. Where the charge is for the taking illegal fees, the sheriff is liable, though the act was committed by his deputy, and it is immaterial whether he recognized the act or knew of it or not.⁷

§ 869. The sheriff is identical in contemplation of law with all his officers, and is civilly and directly responsible for their acts, defaults, torts, extortions or other misconduct, whether it be wilful or inadvertant, in the course of the execution of their duties.⁸ He is liable

¹ 5 Hill 440, *The People v. Warren*.

² *Cow. & Hill's Notes*, 1094; *Watson*, 85; 4 *Wend.* 577, *Coburn v. Hopkins*.

³ 3 *R. S.* 457, § 177.

⁴ 8 *John.* 54, *Wood v. Peake*.

⁵ 31 *N. Y.* 140, *Rinekey v. Stryker*; *S. C.* 25 *How.* 75; 28 *N. Y.* 45; 27 *N. Y.* 596, *Hall v. Stryker*.

⁶ 2 *Greenl. Ev.* § 597.

⁷ 2 *Greenl. Ev.* § 596; 7 *John.* 35, *McIntyre v. Trumbull*.

⁸ 2 *Greenl. Ev.* § 580; 1 *Wend.* 16, *The People v. Dunning*; 15 *Wend.* 575, *Walden v. Davison*; 7 *Cow.* 739, *Gorham v. Gale*; 7 *John.* 35, *McIntyre v. Trumbull*; 5 *Seld.* 598, *Waterbury v. Westervelt*; 31 *Barb.* 439, *Van Tassel v. Van Tassel*; 45 *Barb.* 152, *Pond v. Leman*.

to the party aggrieved for the default of his deputy, for any neglect in the execution of process, or in returning the same, for an escape or for not paying over money collected on execution in the same cases and to the same extent as if the default was his own. So too, he is liable to the defendant where his deputy has taken illegal fees,¹ or for unlawfully taking the goods of another upon process. But if the wrong complained of, not being itself within the scope of the authority given, be neither expressly sanctioned by the sheriff, nor impliedly committed by his authority, he is not responsible, as where the act complained of arises upon the execution of a distress warrant, or the like, which is not legal process.² Nor is the sheriff liable to the plaintiff for the acts of his deputy, where he acts out of the ordinary line of his duty, by direction of the plaintiff. Thus, where the plaintiff or his attorney³ gives the deputy special directions as to the manner of executing process, as by enlarging the time on an execution,⁴ giving credit to a purchaser, or the like. By giving such special instructions the plaintiff makes the deputy his private agent, and he ceases to be the servant of the sheriff.⁵ Where a deputy holding an execution was authorized to sell land on credit, by the plaintiff's attorney, two hundred dollars to be paid down, and the balance in six months, but no part to be credited on the execution till the whole was paid; this was held to be such a departure from his ordinary duty, that the sheriff was discharged from liability even for the amount of the two hundred dollars paid to the deputy under such special agreement. The sureties of the deputy, it was declared would not be liable in such case to the sheriff, and that the sheriff ought not to be liable for the acts of his deputy, unless his redress against the deputy and his sureties was unquestionable.⁶ And the fact that the sheriff afterwards executed a deed in pursuance of the sale under such circumstances by the deputy, does not operate to affirm the acts of his deputy, and adopt them as his own official acts, especially where it does not appear that he had full knowledge of such special instructions.⁷ Nor where the deputy has made a levy, and is instructed by the plaintiff or his attorney to delay, or do nothing until further directed, is the sheriff liable for the property levied on by the deputy,

¹ 7 John. 35, *McIntyre v. Trumbull*.

² 5 Barb. 286, *Moulton v. Norton*; 8 Barb. 514, *Acker v. Ledyard*; 4 Mass. 60, *Marshall v. Hosmer*; 7 Mass. 123, *Bond v. Ward*; 46 N. H. 163, *Stevens v. Colby*; 34 N. H. 261, *Perkins v. Pitman*.

³ 3 Hill 552, *Corning v. Southland*; 7 Cow. 739, *Gorham v. Gale*.

⁴ 1 Denio 548, *Mickles v. Hart*.

⁵ 6 Cow. 465, *Armstrong v. Garrow*; 1 Denio 548, *Mickles v. Hart*; 5 Barb. 286, *Moulton v. Norton*; 8 Barb. 514, *Acker v. Ledyard*; 46 N. H. 163, *Stevens v. Colby*; 13 Mo. 437, *Rollins v. The State*.

⁶ 7 Cow. 739, *Gorham v. Gale*; 23 Vt. 169, *Bellows v. Adm'r of Allen*.

⁷ 7 Cow. 739, *Gorham v. Gale*.

even if it be carried off after the party gives instructions to sell. And if a deputy, after a levy, presuming on the assent of the plaintiff's attorney, departs from the ordinary course of his duty, and the attorney afterwards affirms his acts, neither he nor the sheriff is liable therefor.² And if the plaintiff wishes to charge the sheriff for the subsequent acts or neglect of the deputy, he must give notice to the sheriff himself to proceed. Fresh instructions to the deputy will not be sufficient.³ For the purpose of discharging the sheriff from liability for the acts of his deputy, it must be shown not only that the plaintiff directed the deputy to depart from the line of duty imposed by law, but that the deputy followed, or at least undertook to follow the directions given. He cannot otherwise be regarded in any respect as the agent of the plaintiff. Thus, where the deputy was authorized to sell on a credit, and take good endorsed notes, and he took a note without an endorser, and allowed others to take goods bought by them without payment or a note, it was held that the sheriff was not released from responsibility.⁴ A false representation by a deputy of the form of his return to an execution, whereby a party was induced, without examination, to file a creditor's bill, is no ground of action, either against the sheriff or the deputy.⁵ Nor is the sheriff responsible to the plaintiff for the acts of a special deputy where the appointment of such deputy was at his request. Nor is the sheriff liable for the escape of a prisoner where the arrest is made by such special deputy, until he is actually in jail, or in the actual custody of such officer. Nor can the plaintiff require the sheriff to return such process, but it is otherwise as to the other parties thereto.⁶ Where the property of the defendant or any other person has been seized, the action may be against the sheriff, or against the deputy who executed the process, or both.⁷

§ 870. Where the sheriff is sued for the acts or defaults of his deputy, it is sufficient, *prima facie*, to show the relation, that the deputy acted publicly and notoriously in that character.⁸ But a return to process by one styling himself deputy sheriff, is not sufficient as against the sheriff. And if the deputy is not a general, but a special deputy, appointed to perform a particular act, proof of the appointment or deputation must be given. This may be done by producing the writ. *ten deputation*; or if it cannot be had, by giving the sheriff notice to produce it, and in case of failure, giving parol proof of its contents. When the fact of the relationship is established, the declarations of

¹ 1 Denio 548, *Mickles v. Hart*.

² 3 Hill 552, *Corning v. Southland*.

³ 1 Denio 548, *Mickles v. Hart*.

⁴ 3 Seld. 453, *Sheldon v. Payne*.

⁵ 5 Hill 303, *Starr v. Bennett*.

⁶ Allen 87; *Sewell* 46; *Watson* 35.

⁷ 5 Seld. 598, *Waterbury v. Westervelt*.]

⁸ 2 Greenl. Ev. § 532.

the deputy, made within the scope of his authority, and while the process was in his hands, and in the course of execution, are to be taken as part of the *res gestæ* and bind the principal,¹ but not others.² And where the admissions of the deputy tend to charge himself, and he would be bound by the record, (and he is thus bound by, and the record is conclusive evidence against him, both of the facts which it recites, and of the amount of damages, whenever he is liable over to the sheriff, and has been duly notified of the pendency of the action and required to defend,) then in all such cases, such admissions are competent evidence as against the sheriff. This principle applies to all declarations of the deputy, without regard to the time of making them. But if the record is not evidence against the deputy making the admissions, his declarations are admissible only against the sheriff when they accompanied the doing the act complained of, and while the process was in his hands and forming part of the *res gestæ*.³

§ 871. Actions for escapes must be brought within one year,⁴ and this, whether the escape is before or after the committal.⁵ In other cases, actions against a sheriff, coroner or constable, must be brought within three years, whether upon a liability incurred by the doing of an official act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution;⁶ and also actions for seizing and selling the goods of one party on an execution against another.⁷ This limitation however only extends to official acts, or the omission of official duty, and does not extend to acts done *colore officii*.⁸ The action against the sheriff must be brought in his own county.⁹ But this is for affirmative acts, and not for those of mere omission or neglect of official duty, as for not paying over money received by him as such sheriff.¹⁰ Where the action is local against the sheriff, one brought against his representatives is also local.¹¹ Though the statute of limitations may bar an action against the sheriff for not returning a writ, still he may be proceeded against by attachment; but in such case the court has held that it will impose no fine, but will discharge the attachment on his returning the writ and paying costs.¹² And in a late case where the sheriff had suffered the attorney to sell the premises under a decree in partition, and receive and squander the purchase

¹ 10 John. 478, Mott v. Kip; 6 Barb. 79, Stewart v. Wells; 4 Kern. 270, Barker v. Binniger; Cow. & Hill's Notes, 191; 12 Mass. 163, Tyler v. Ulmer; 9 Sergt. & Rawle 390, Wheeler v. Hamright.

² Sewell, 34

³ Greenl. Ev., § 583.

⁴ Code, § 94.

⁵ 7 Wend. 454, Brown v. Littlefield.

⁶ Code, § 92, sub. 1; 19 Wend. 283, Morris v. Van Voast; 46 Barb. 559, Peck v. Hurlburt.

⁷ 18 Barb. 89, Dennison v. Plumb.

⁸ 19 Wend. 283, Morris v. Van Voast.

⁹ 7 How. 248, The People v. Hayes.

¹⁰ 13 Wend. 35, Elliot v. Cronk's adm's.

¹¹ 13 Wend. 35, Elliot v. Cronk's adm's.

¹² 4 Hill 71, The People ex rel. Southwick v. Everest.

money, it was held that the statute of limitations applied to proceedings by attachment to compel him to make a report of sale and pay over the purchase money, as well as to any action.¹ Where the sheriff, under warrants against an absconding debtor, converted the assets seized, from time to time, it was held that all the property attached was but a single fund for the security of the attaching creditors, and that the sheriff had a right to retain the fund until all conflicting charges were settled, and hence that the statute of limitations did not begin to run the moment he had collected sufficient to satisfy the first judgment or execution.²

§ 872. The rule that personal actions die with the person, is applicable to actions against the sheriff. Thus, an action will not lie against the representatives of a sheriff, for an escape which occurred during his life;³ nor for a tort or misfeasance in office.⁴ Nor will an action lie against the executors of the sheriff, for the default of his deputy in returning process, though the action of assumpsit be given by the statute, unless the estate of the deceased was benefitted by the act complained of, as where property was tortiously taken and sold, or remains in specie in the hands of the representatives.⁵

§ 873. A sheriff sued for an act done by him in the execution of process, is entitled to take upon himself the defence of the action and to retain such attorney as he sees fit, notwithstanding he was indemnified by the party suing out the process; and where the sheriff had retained an attorney, it was held that such party had no right to substitute another in his place.⁶

§ 874. Formerly sheriffs were entitled to double costs, when judgment was rendered in their favor in any action brought against them for any act of misfeasance or malfeasance in office.⁷ But it is held that by the provisions of the Code they are no longer entitled to receive double costs. The right of the court to give an extra allowance is said to be a convenient substitute for double costs.⁸

§ 875. The damages to be recovered against the sheriff will in general be commensurate with the extent of the injury sustained by the party aggrieved. Where he is sued for not arresting the defendant, or for an escape, or for not making a levy, the amount of the judgment against the debtor, is *prima facie*, the extent of the injury which the plaintiff has sustained by the officer's breach of duty; yet if the neglect was unintentional, it is competent for the officer to

¹ 31 Barb. 439, *Van Tassel v. Van Tassel*.

² 2 Keyes 608, *Davy v. Field*.

³ 1 Caines 124, *Martin v. Bradley*.

⁴ 29 Me. 462, *Gent v. Gray*; 30 Me. 194, *Valentine v. Norton*.

⁵ 9 Wend. 29, *The People v. Gibbs*.

⁶ 20 Wend. 605, *Peck v. Acker*; 7 How. 248, *The People v. Hayes*.

⁷ 3 R. S. 908, § 4.

⁸ 6 How. 45, *Barber v. Crossett*; *Id.* 172, *Nestle v. Jones*; *Id.* 253, *Foster v. Cleveland*.

prove in mitigation of damages, any fact showing that the plaintiff has suffered little or nothing, by such default or breach of duty. If the wrong done by the officer was not the result of design to injure, and if the plaintiff is not placed in a worse condition than he would have been in, had the officer done his duty, the party can recover no greater damages than he has actually suffered by the wrong. Thus, where the defendant was sick and the sheriff, on that account, omitted to arrest him, he may show this, and that he may be arrested as easily as before, in mitigation of damages.¹

§ 876. The damages which may be recovered against the sheriff for an escape will depend upon the character of the process under which the prisoner is held. Thus it is provided by statute, in case of the escape of one committed for contempt, the sheriff shall be liable to the party aggrieved for his damages sustained thereby.² And when the sheriff or jailer wilfully suffers an insolvent debtor, who is committed for refusing to answer all lawful questions put to him, or for refusing to sign his examination, to escape, they shall be liable to indictment for a misdemeanor, and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.³

§ 877. Where the action is for an escape from jail, when the prisoner is confined on mesne process, or upon surrender in exoneration of his bail, made either before or after judgment rendered, the sheriff shall be answerable to the party at whose suit the prisoner shall have been committed to the extent of the damages sustained by such party.⁴ In such case the plaintiff is, *prima facie* entitled to his whole debt, which he could have, or which he has recovered against the debtor. But the party can recover no more in such case than he has lost by the escape; and hence, if the prisoner was insolvent, and the sheriff shows the fact, the party will be entitled to recover only nominal damages.⁵ And if the plaintiff can recover against another, this is a ground for a reduction of damages.⁶ And where the plaintiff had real and competent security for his debt, and relinquished it after knowledge of an escape, and with the intent to charge the sheriff with the debt, it was held that the sheriff might avail himself of that fact, in mitigation of damages.⁷

¹ 10 Mass. 472, *Wells v. Bartlett*; 2 Greenl. Ev. § 599.

² 3 R. S. 736, § 82.

³ 3 R. S. 118, § 18.

⁴ 3 R. S. 736, § 83.

⁵ 1 John. 215, *Potter v. Lansing*; 7 John. 165, *Stewart v. Kip*; 2 John.

Ca. 205, *Dole v. Moulton*; 17 Wend. 543, *Patterson v. Westervelt*; 24 Wend. 381, *Fairchild v. Case*; 30 N.Y. 581, *Smith v. Knapp*; 35 Barb. 514, *Barnes v. Willett*.

⁶ 1 Cow. Tr. 380; 30 N. Y. 581, *Smith v. Knapp*.

⁷ 7 John. 189, *Russel v. Turner*.

§ 878. Where a prisoner, in execution, in a civil action shall escape without the assent of the party at whose suit such prisoner was committed, the sheriff shall be answerable therefor to such party, for the debt, damages or sum of money for which such prisoner was committed, to be recovered in an action of debt.¹ In such case if debt is brought, the sheriff is liable only for the amount of the judgment without interest.² It has been held that where the action is for the precise amount, that while the insolvency of the defendant was not a defence either total or partial, it was a question to be determined at the trial whether the evidence might be given in mitigation of damages.³ But if the action is case, instead of debt, the party may recover his damages whatever they may be, but the sheriff will be at liberty to show matters in mitigation of damages.⁴ Where the sheriff is liable for the escape of one of several defendants, he is liable for the whole debt, and not for a proportionate part.

§ 879. Where the sheriff has become liable as bail in any case, he is liable like other bail, and he can give evidence of the debtor's insolvency in mitigation of damages.⁵ And where he has become so liable on an arrest in an action for the delivery of personal property, his liability is of the same nature and extent as the original bail, viz.: for the delivery of the property to the plaintiff and the payment of such sum as may be recovered against the defendant.⁶ But where the judgment was erroneous, for the damages only and not for the return of the property as well, it was held that the bail would not be liable in such case, and consequently not the sheriff.⁷

§ 880. Where the action is for not paying over money collected, the recovery will be the amount collected with interest from the return day of the process, less the sheriff's fees on the process.⁸ If the action is for neglect of duty in not levying and returning an execution, the plaintiff is entitled, *prima facie*, to recover the amount of the judgment, with interest.⁹ But the sheriff may show in mitigation of damages that the whole sum could not be collected upon due diligence.¹⁰ But it will be no defence to the action that the defendant in the execution has abundant property out of which the judgment may still be collected.¹¹ Where the execu-

¹ 3 R. S. 736, § 84.

² 6 How. 73, *Hutchinson v. Brand*.

³ 23 How. 129, *McCreary v. Willett*; 35 Barb. 514, *Barnes v. Willett*.

⁴ 2 John. 454, *Rawson v. Dole*; 14 John. 255, *Thomas v. Weed*; 1 Wend. 398, *Littlefield v. Brown*.

⁵ 31 N. Y. 255, *Metcalfe v. Stryker*.

⁶ 27 How. 20, *McKenzie v. Smith*.

⁷ 27 N. Y. 324, *Gallarati v. Orser*.

⁸ Ante, § 425; 2 Greenl. Ev. 588.

⁹ 1 Hill 275, *Bank of Rome v. Curtis*;

4 Sandf. 67, *Ledyard v. Jones*.

¹⁰ 6 Hill 550, *Pardee v. Robertson*; 1 Hill 275, *Bank of Rome v. Curtis*; 3 Seld. 550, *Ledyard v. Jones*.

¹¹ 3 Denio 327, *Stevens v. Rowe*; 4 Sandf. 67, *Ledyard v. Jones*; 1 Hill 275, *Bank of Rome v. Curtis*; 6 Hill 550, *Pardee v. Robertson*; 3 Seld. 550, *Ledyard v. Jones*; 3 Seld. 195 *Bacon v. Cropsey*.

tion of process has been interfered with, so as to relieve the sheriff from liability, he may be required to return the process, and on failure to do so the plaintiff will be entitled to recover nominal damages.¹ Where the sheriff is sued for returning nulla bona, instead of levying on certain property belonging jointly to the debtor and another, the proper measure of damages is half the value of the goods.²

§ 881. Where the sheriff seizes the goods of another, if trover is brought, the real value of the goods may be recovered against him. If the plaintiff has only a special property in the goods, then he can only recover to the amount of such special property.³ But if the action be for money had and received, only the moneys for which the goods were sold can be recovered. In replevin against the sheriff for flour taken by him on execution, on the plaintiff's electing to take judgment for its value, the plaintiff will be entitled only to the value at the commencement of the suit, with interest from that time, although it may appear that flour between that period and the trial was worth double the then market value. He cannot add as damages, the difference between the value at the replevin, and the highest subsequent market value up to the time of trial.⁴

§ 882. The official bonds of sheriffs are, in form, given to the people of this state, but they are held for the benefit of, and as an indemnity to, all parties who may be injured by the default or misconduct in office of the sheriff executing the same.⁵ They are in effect a security not only to suitors, who might have a direct interest in the action of the sheriff, but to any citizen who might be injured by his official misconduct.⁶

§ 883. The condition of the sheriff's official bond is, that he shall well and faithfully, in all things, perform and execute the office of sheriff of the county during his continuance in said office by virtue of his election, without fraud, deceit or oppression.⁷ It is declared that every bond taken from a public officer shall be deemed to be in force and obligatory upon the principal and sureties therein, so long as such officer shall continue to discharge the duties of his office, and until his successor is appointed.⁸ The sheriff's bond is not only obligatory upon him and his sureties to this extent, but also during the time he or any of his deputies are completing the execution of process commenced before the termination of his office.⁹ And in the case of an under sheriff it is provided that every default or misfeasance in

¹ 1 Denio 548, *Mickles v. Hart*.

² Sewell 453.

³ Ante, § 831.

⁴ 3 Sandf. 614, *Suydam v. Jenkins*.

⁵ 1 R. S. 876, § 162.

⁶ 4 Com. 173, *The People ex rel. Kellogg v. Schuyler*.

⁷ 1 R. S. 876, § 162.

⁸ 1 R. S. 412, § 34.

⁹ Ante, § 6.

office of such under sheriff while he discharges the duties of sheriff during a vacancy therein, shall be a breach of the condition of the bond given by the sheriff who appointed him.¹ It is farther provided, however, that the sureties in any official bond shall be exonerated from all liability by reason thereof, for all acts or omissions of the principal, after he shall have renewed any official bond pursuant to law.² The condition of the sheriff's bond is broken whether the act complained of was suffered or committed by the sheriff himself or by his under sheriff or deputy or jailer. But if the deputy was a special deputy, appointed at the instance of the party aggrieved, neither the sheriff nor his surety will be liable to such party for the neglect or misconduct of such special deputy.³

§ 884. The liability of the sureties of a sheriff upon his bond, is coextensive with the liability of the sheriff himself, in respect to all neglect of duty or acts which he is by law required to perform as sheriff.⁴ If a duty is imposed by law upon a sheriff, as such, which he is bound at his peril faithfully to discharge, and it is neglected without some legal excuse, or is performed in an improper manner, the sureties are liable. A neglect of duty is a breach of the condition of the bond, although it should not involve in it any positive act of fraud, deceit or oppression.⁵ If he refuses or neglects to return process or to pay over money collected by him on execution, or received upon the redemption of lands sold on execution, the condition of his bond is broken.⁶ The sureties of the sheriff are liable for money received by him on execution, after the execution of the bond, though the process under which it was collected, was received by him previous to the giving the bond.⁷ It is no answer to an action on a sheriff's bond, that he is sought to be charged for the nonperformance of duties created subsequently to the act under which the bond is executed, provided that such duties existed at the date of the bond. It might be otherwise if new duties were imposed upon the sheriff after the giving of the bond.⁸ If he executes process in such a manner that the rights or interests of others are impaired, the condition of the bond is broken, and the party injured thereby will be entitled to leave to bring an action thereon for the recovery of his damages. Thus, the

¹ 1 R. S. 877, § 167

² 1 R. S. 412, § 35.

³ Ante, § 869. But this is questioned in North Carolina, 2 Jones (N. C.) 280, Martin v. Martin.

⁴ Keyes 93, The People ex rel. Metcalf v. Dikeman.

⁵ 6 Wend. 454, The People v. Brush; 18 John. 390, The People v. Spraker.

⁶ 6 Wend. 454, The People v. Brush; 5 Wend 102, Rhineland v. Mather; 3 Barb. 475, Colvin v. Holbrook; 3 Scam. (Ill.) 207, Elkin v. The People.

⁷ 15 Wend. 623, The People ex rel. Gibson v. Ring.

⁸ 6 Wend. 454, The People v. Brush; 13 Mo. 7, Murray v. The State.

plaintiff in process, will be entitled to leave to prosecute the bond where the sheriff has made return of nulla bona to an execution, when there was sufficient property.¹ So the sureties of the sheriff are liable on the bond for a trespass committed by the sheriff by color of office, as where he levies under process against one, upon the goods of another.²

§ 885. Whenever a sheriff shall have become liable for the escape of any prisoner committed to his custody, or whenever he shall have been guilty of any default or misconduct in his office, the party injured thereby, may apply to the supreme court for leave to prosecute the official bond of such sheriff.³ Such application shall be accompanied by proof of the default or delinquency complained of, and that no satisfaction for the same has been received; and by a certified copy of such official bond.⁴ The party moving for leave, must show affirmatively that the sheriff has been guilty of some default, or misconduct in his office.⁵ It is not necessary that a previous recovery should be had against the sheriff for the particular default to entitle the party to leave to prosecute the sheriff's bond,⁶ except where the sheriff has become fixed as bail, by reason of the neglect to justify of the sureties of one arrested, when a judgment must first be recovered against him, and an execution be returned unsatisfied in whole or in part, before leave will be granted to prosecute the sheriff's bond.⁷ If the claim is for the nonpayment of money, a demand thereof must first be shown.⁸

§ 886. Upon such application and proof, the court shall order that such bond shall be prosecuted; and the applicant shall thereupon be authorized to prosecute the same in the supreme court only, in the name of the people of this state, stating in the process, pleadings, proceedings and record in such action, that the same is brought on the relation of such applicant.⁹ In such actions, the same pleadings and proceedings shall be had, as are prescribed by law in the case of suits upon bonds with other conditions than for the payment of money, except as hereinafter mentioned, and judgment shall be rendered for the defendants in the like cases. The proceedings upon sheriff's bonds are not affected by the provisions of the Code.¹⁰

¹ 5 Hill 555, *Ex parte Chester*.

² 4 Com. 173, *The People ex rel. Kellogg v. Schuyler*; 19 Mo. 369, *The State v. Moore*; 5 Monroe 193, *The Commonwealth v. Stockton*; 5 Binn. (Penn.) 184, *Carnach v. The Commonwealth*.

³ 3 R. S. 779, § 1; 42 Barb. 281, *In the matter of Chamberlain*.

⁴ 3 R. S. 779, § 2.

⁵ 4 Hill 572, *Ex parte Reed*.

⁶ 5 Hill 555, *Ex parte Chester*.

⁷ Code, § 202.

⁸ 5 Wend. 102, *Rhineland v. Mather*.

⁹ 3 R. S. 179, § 3.

¹⁰ 3 R. S. 779, § 4.

§ 887. A judgment on such bond shall not be a bar to any other suit that may be brought on the same official bond, by the same plaintiff, or by any other plaintiff, for any other delinquency or default of such sheriff, than such as was assigned as a breach of the condition of such bond, in the action in which such judgment was rendered.¹ But the sureties are not liable thereon, beyond the penalty of the bond.²

§ 888. During the pending of any suit upon such official bond, or after judgment rendered in such suit, any other party aggrieved by the default or delinquency of such sheriff, may, in like manner, apply to the supreme court for leave to prosecute such official bond.³

§ 889. Upon such leave being granted, the applicant may prosecute such bond, in the manner hereinafter mentioned; and the pendency of any other suit, at the relation of any other person, on the same bond, or a judgment recovered by or against any other person on such bond, shall not abate, or in any manner affect such suit, or the proceedings therein, except as hereinafter mentioned.⁴

§ 890. Any person who may have recovered any judgment upon such official bond, may in like manner, apply for leave again to prosecute such bond, whenever he is aggrieved by any other default or delinquency, than such as shall have been the subject of the former action, and shall proceed therein, in like manner as hereinbefore mentioned.⁵

§ 891. No such suit shall be barred, nor shall the amount which the plaintiff may be entitled to recover therein, be affected by any plea or notice made by any surety in such bond, of a judgment recovered thereon, unless it be accompanied by an allegation that the sureties in such bond, some or one of them, have been obliged to pay the damages assessed in such judgment, or some part thereof, for the want of sufficient property of such sheriff whereon to levy the same, or that they will be obliged to pay the same, or some part thereof, for the same reason; nor unless such plea or notice be verified by the oath of the defendant making the same.⁶

§ 892. If it appear that the amount of any damages so recovered, which such surety has been obliged to pay, or will be obliged to pay, as specified in the last section, is equal to the amount for which such defendant shall be liable by virtue of the bond, he shall be acquitted and discharged of all further liability, and judgment shall be rendered in his favor.⁷

³ R. S. 779, § 5.

⁶ Cow. 543, *Lewis v. Ball*.

³ R. S. 780, § 6.

⁴ R. S. 780, § 7.

⁵ R. S. 780, § 8.

⁶ R. S. 780, § 12.

⁷ R. S. 780, § 13.

§ 893. If it shall appear that the amount of any damages so recovered, and which such surety has been obliged to pay, or which he will be obliged to pay, is not equal to the amount of such surety's liability, the amount thereof shall be allowed to such defendant in establishing the extent of his liability in any such action.¹

§ 894. Whenever judgment shall be obtained against a sheriff and his sureties, a direction shall be indorsed on the execution issued thereon, by the attorney issuing the same, to levy the amount of such execution in the first place, of the property of such sheriff, and if sufficient property of such sheriff cannot be found to satisfy such execution, then to levy the deficiency of the property of the sureties.²

§ 895. In every such case of a judgment against a sheriff and his sureties, no execution against the bodies of the defendants shall be issued, until an execution against the property shall have been returned unsatisfied in whole or in part.³

§ 896. Whenever several judgments shall be obtained at the same term, upon any official bond of a sheriff, for damages amounting in the whole to more than the sums for which the sureties therein shall be liable, the supreme court shall order the moneys levied upon such judgments from the property of the sureties, to be distributed to the relators respectively in such judgments, in proportion to the amount of their respective recoveries.⁴

§ 897. If executions be issued upon several judgments obtained at the same term, upon any such official bond, and sufficient moneys shall not be raised to satisfy all of the said executions, the supreme court shall distribute the moneys collected on such executions, to the relators respectively in such judgments, in proportion to the amount of their respective recoveries.⁵

§ 898. No scire facias shall be brought upon any judgment rendered upon such official bond, by the party at whose relation such judgment was obtained, or by any other person, for any breach of the condition of such bond.⁶

§ 899. Every suit brought on such official bond, and every judgment rendered therein, shall be deemed the private suit and judgment of the party on whose relation the same shall be brought or obtained; such suit may be discontinued and the relator may be nonsuited, as in private suits; and the judgment therein may be cancelled and discharged by the relator, in the same manner as if he were the nominal plaintiff, and shall be deemed satisfied in the same cases as judgments

¹ 3 R. S. 781, § 14.

² 3 R. S. 781, § 15.

³ 3 R. S. 781, § 16.

⁴ 3 R. S. 781, § 17.

⁵ 3 R. S. 781, § 18.

⁶ 3 R. S. 780, § 9.

by individuals.¹ A verdict and judgment in one such action is not evidence in another action to charge the sureties.²

§ 900. If the suit be discontinued, or the relator be nonsuited, or judgment be rendered for the defendants, upon verdict, demurrer, or otherwise, costs shall be awarded against the relator, as if he were the nominal plaintiff, and judgment shall be rendered for such costs, and execution thereon awarded against him, in the same manner.³

¹ 3 R. S. 780, § 10.

³ 3 R. S. 780, § 11.

² 19 Wend, 482, *The People ex rel.*
Bacon v. McHenry.

THE DUTIES OF CORONERS.

CHAPTER I.

OF THE ELECTION, QUALIFICATIONS AND DUTIES OF CORONERS.^a

§ 901. The constitution of this state declares that coroners shall be chosen by the electors of the respective counties, once in every three years, and as often as vacancies shall happen.¹ And it is provided by statute that there shall be elected four coroners for every county in the state.² It is further provided that they shall be chosen in the same manner, and at the same general election as sheriffs, and shall hold their offices for the same term, and be removable in the same manner.³ The coroners first chosen in every county that may hereafter be erected, shall be elected at the general election next succeeding the erection of the county, or at such other time as the legislature shall direct.⁴ When the county canvassers shall have

¹ Cons. Art. X., § 1.

² 1 R. S. 379, § 1, sub. 3; Id. 398, § 69. In Queen's county six Coroners shall be chosen, one to reside in each town, Laws 1859, chapter 127. And in Suffolk county, one additional Coroner is to be chosen to reside on

either Fisher's Island, or upon one of the islands adjacent thereto, called the Hommocks, or upon Mystic Island, formerly called Ram Island, Laws 1860, Ch. 113.

³ 1 R. S. 397, §§ 68, 69; Ante, § 1.

⁴ 1 R. S. 401, § 89.

^a Ala.—R. C. § 935.

Ark.—Dig. 1858, p. 271.

Cal.—Dig. 1860, p. 112.

Del.—R. S. 1852, p. 72.

Fa.—Dig. 1847, p. 129.

Ga.—Code, p. 130.

Ind.—Cons. Art. 6, § 2; 1 R. S. 1852, pp. 166, 223; 2 R. S. p. 13; Laws 1855, p. 52.

Ia.—Rev. 1860, p. 63.

Ill.—2 St. 1123.

Kan.—Gen. St. 1868, p. 280.

Ky.—2 R. S. 349, 726.

La.—R. S. p. 107; Laws 1869, p. 20.

Me.—R. S. 489.

Md.—1 Code 145.

Mass.—Gen. St. 1860, pp. 24, 152, 618, 813, Sup. 53, 137.

Mich.—St. 1857, p. 216.

Minn.—Rev. 1866, p. 83, 119.

Miss.—Rev. Code, pp. 90, 128.

Mo.—Gen. St. 1865, p. 391.

Neb.—R. S. 32, p. 510.

Nev.—St. 1866, p. 233.

N. H.—Gen. St. 1867, 400, 403.

N. J.—Dig. 1865, pp. 108, 135; Laws 1861, p. 4.

O.—2 R. S. 1403.

On.—Gen. L. 396.

Penn.—Dig. 1861, p. 893.

R. I. R. S. 569.

Tenn.—Code, p. 143.

Tex.—Cons. Art. 1, § 19.

Va.—Code, 1849, p. 247.

Wis.—Cons. Art. 6, § 4; R. S. 164, 173, 649, 835.

determined who are elected to the office of coroner, the county clerk shall prepare certified copies of the certificate of the declaration of such board of county canvassers, and shall, without delay, deliver one of such copies to each person so elected.¹ And the county clerk shall transmit to the secretary of state, within twenty days after a general election, and within ten days after a special election, a list of the names of the persons elected in the county as coroners at such election, with the places of their residence respectively.² And the secretary of state shall enter in a book to be kept in his office, the names of the coroners elected in this state, and their place of residence and their term of office.³

§ 902. No person shall be capable of holding the office of coroner in this state who, at the time of his election or appointment, shall not have attained the age of twenty-one years, and who shall not then be a citizen of this state.⁴ And the office is declared to be so far local as to require the residence of every person holding the office within the county in which the duties of his office are required by law to be executed.⁵ And they are prohibited while they continue in office from practicing as a counsellor, solicitor or attorney, in any court of law or equity.⁶ Coroners are not, like sheriffs, prohibited from holding the office for more than one term in succession, nor from holding any other office at the same time.⁷

§ 903. The coroners so chosen, unless they shall be elected to supply a vacancy then existing, shall enter on the duties of their respective offices on the first day of January following the election at which they shall be chosen,⁸ and shall hold the office for three years, whether they are elected at the close of a full term, or to fill a vacancy.⁹ And they continue to discharge the duties of their respective offices, although the term thereof shall have expired, until a successor in such office shall have duly qualified.¹⁰

§ 904. Every person elected or appointed to the office of coroner, before he shall enter upon the duties of such office, shall take the constitutional oath of office.¹¹ Such oath shall be taken and subscribed, and deposited in the office of the clerk of the county, within fifteen days after the officer shall be notified of his election or appointment, or within fifteen days after the commencement of his term of office.¹²

¹ 1 R. S. 439, § 21.

² 1 R. S. 439, § 22.

³ 1 R. S. 442, § 43.

⁴ 1 R. S. 407, § 1; 23 Wend. 490, Green v. Burke.

⁵ 1 R. S. 383, 13.

⁶ 1 R. S. 401, § 85.

⁷ Ante, § 2

⁸ 1 R. S. 408, § 3.

⁹ 2 Wend. 266, *The People ex Rel. Gallup v. Green*; 11 Wend. 132; 11 Wend. 511, *The People ex rel. Bunn v. Coutant*; 1 R. S. 398, § 69.

¹⁰ 1 R. S. 409, § 14.

¹¹ 1 R. S. 410, § 24.

¹² 1 R. S. 411, § 25.

And if any person shall execute any of the duties or functions of such office without having taken and subscribed the oath of office required by law, he shall forfeit the office and shall be deemed guilty of a misdemeanor and punished by fine or imprisonment.¹ Notwithstanding such neglect to take the oath he will, however, so far as the rights of third persons and the public are concerned, be considered an officer *de facto*.²

§ 905. Coroners may resign their office to the governor.³ They may also be removed from office by the governor, on charges preferred against them, in the same manner as sheriffs.⁴ And their office will become vacant on their ceasing to be inhabitants of the county for which they shall have been chosen; on their conviction of an infamous crime, or any offence involving a violation of their oath of office; on their neglect or refusal to take the oath of office, within the time required by law;⁵ and on their acceptance of another office the duties of which are incompatible with those of the office of coroner.⁶

§ 906. When a county is divided, and a part is set off to another county, or a new county is formed, with a new name, the coroner or coroners residing in such parts of the county so set off, lose their office; but it is otherwise if they reside in the part of the county which retains the old name.⁷

§ 907. If any sheriff, jailer, coroner, marshal or constable, shall,

1. Wilfully and corruptly refuse to execute any lawful process directed to them, or any of them, requiring the apprehension or confinement of any person charged with a criminal offence; or,

2. Shall corruptly or wilfully omit to execute such process by which such person shall escape; or,

3. Shall wilfully refuse to receive in any jail under his charge, any offender lawfully committed to such jail, and ordered to be confined therein, on any criminal charge or conviction, or on any lawful process whatever; or,

4. Shall wilfully suffer any offender, lawfully committed to his custody, to escape or go at large; or,

5. Shall receive any gratuity or reward, or any security or engagement for the same to procure, assist, connive at or permit any prisoner in his custody on any civil process or on any criminal charge or conviction to escape, whether such escape be attempted, or affected, or not;

¹ 1 R. S. 412, § 36.

² 1 Denio, 574, *The People v. Hopson*.

³ 1 R. S. 413, § 38, sub. 4.

⁴ Ante, § 10; 1 R. S. 398, § 69.

⁵ 1 R. S. 413, § 40.

⁶ 2 Hill 93, *The People ex rel. Whiting v. Carrique*; 8 Cow. 212, *Paddock v. Cameron*.

⁷ Ante, § 9.

He shall, upon conviction, be imprisoned in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment, and shall forfeit his office, and shall forever be disqualified to hold any office or place of trust, honor or profit under the laws or constitution of this state.¹

§ 908. Every person holding or exercising any office under the laws or constitution of this state, who shall, for any reward or gratuity, paid or agreed to be paid, grant to another the right or authority to discharge the duties of such office, shall, upon conviction, be deemed guilty of a misdemeanor, and in addition to the punishment prescribed in cases of misdemeanors, he shall forfeit his office and be forever disabled from holding such office.²

§ 909. When a vacancy shall exist in the office of coroner, the governor shall appoint some suitable person, who may be eligible to the office, to execute the duties thereof until the commencement of the political year next succeeding the first annual election after the happening of the vacancy at which such officer could be by law elected; and the person so appointed to fill such vacancy, shall possess all the rights and powers, and be subject to all the liabilities, duties and obligations of such officer, as they are now or may hereafter be prescribed by law.³ The person so appointed may be removed by the governor at any time, without cause, and he may appoint another in his place.⁴

§ 910. Vacancies in the office of coroner shall be supplied at the general election succeeding the happening thereof.⁵ If the vacancy be not supplied at the general election next succeeding the happening thereof, a special election to supply such vacancy shall then be held.⁶ If the vacancy be not supplied by reason of two or more candidates having an equal number of votes for the same office, the special election shall be ordered by the board of canvassers, having the power to determine on the election of the officer omitted to be chosen, and in all other cases, such election shall be ordered by the governor, who shall issue his proclamation therefor,⁷ in which he shall specify the county where such election is to be held; the cause of such election; the name of the officer in whose office the vacancy has occurred; the time when his office will expire, and the day on which such election shall be held, which shall not be less than twenty, nor more than forty days from the date of the proclamation.⁸

¹ 3 R. S. 965, §§ 21, 22.

² 3 R. S. 977, § 37.

³ 1 R. S. 414, § 51.

⁴ C Hill 49, The People ex rel. Faxton v. Parker.

⁵ 1 R. S. 420, § 8.

⁶ 1 R. S. 420, § 9.

⁷ 1 R. S. 420, § 10.

⁸ 1 R. S. 420, § 11.

§ 911. In each of the counties of this state, with the exception of the city and county of New York, the jurisdiction of the coroners chosen in and for such counties respectively, is coextensive with the limits of the county, and though there be several coroners in the same county, any one can execute any duty imposed by law on coroners in any part of the county. Formerly but one coroner was chosen for the city and county of New York, whose jurisdiction was likewise coextensive with the limits thereof; and it was provided by statute that in case of the absence of said coroner, or of his inability to attend from sickness or any other cause, at any time, any alderman or special justice of the city might perform, during such absence or inability, any duty appertaining to the office of coroner of the said city, under the provisions of the statute concerning coroners' inquests; and such alderman or justice should possess the like authority, and be subject to the like obligations and penalties as said coroner.¹ It is now provided by law that four coroners in the city and county of New York, instead of one as heretofore, shall be elected in the same manner, and at the same general election as sheriff's; hold the office for the same term, and be removable in the same manner.² The mayor of said city shall, before the coroners elected under the said act shall enter upon the duties of their office, assign one of the said coroners to each of the senate districts of the city of New York, and they shall respectively exercise their powers during the term for which they are so elected, within the district to which they shall be respectively assigned; and all the provisions of law applicable to the coroner of the city and county of New York, shall be applicable to the officers elected under said act, except as to the number to be elected. In case of the absence or inability of either of said coroners to discharge the duties of their respective offices, some alderman or special justice of the city must discharge such duties, and not one of the other coroners. Their jurisdiction is restricted to the district to which they may have been designated.³

§ 912. Any justice of the peace in any town or city of the state is authorized, in case the attendance of a coroner cannot be procured within twelve hours after the discovery of a dead body, upon which an inquest is now by law required to be held, to hold an inquest thereon in the same manner and with the like force and effect as coroners. And in all cases in which the death is not apparent, it shall be the duty of the justice to associate with himself a regularly licensed physician, to make a suitable examination for the discovery

¹ 3 R. S. 1037, § 9.

² 1 R. S. 398, § 69.

³ 1 R. S. 398, § 69.

of said cause. And the justice holding such inquisition shall receive the same fees as are now allowed by law to coroners.¹

§ 913. The duties of coroners are,

1. To hold inquests upon the bodies of persons slain, or who have suddenly died, or who have been dangerously wounded, or found dead under such circumstances as to require an inquisition, within their jurisdiction;²

2. To issue process for the arrest, and to take the examination of one charged upon inquest, with murder, manslaughter, or assault;³

3. To act as conservators of the peace within their county, and for this purpose they are clothed with all the powers of the sheriffs or constables of such county;⁴

4. To execute process whenever the sheriff of any county shall be a party in any suit;⁵

5. To discharge the duties of the office of sheriff of the county whenever there is a vacancy in the office, and there shall be no under sheriff of such county then in office, on being designated for that purpose by the county judge;⁶

6. And to take charge of any wrecked property which may be found within their jurisdiction.⁷ Their duties under this statute have already been pointed out.⁸

§ 914. The duties of coroners upon inquests, and in the examination of prisoners charged upon inquest with murder, manslaughter, or assault, cannot be delegated.⁹ Such duties must be executed by them in person, and not by deputy. But where a coroner is designated under the provisions of the statute to perform the duties of the office of sheriff of his county during a vacancy therein, he possesses all the powers of sheriff, and of course must possess the right of appointing deputies to aid him in the discharge of such duties.¹⁰

§ 915. The sudden violent deaths which are within the coroner's office to inquire, are of these kinds;

1. From the visitation of God;

2. By chance, where no other had a hand in it, as if a man falls from a house or cart;

3. By his own hand, as *felo de se*;

4. By the hand of another where the offender is not known;

5. By the hand of another, where the offender is known, whether by murder, manslaughter, in self-defence, or by chance.¹¹

¹ Laws 1864, Ch. § 379.

² 3 R. S. 1036, § 1.

³ 3 1037, §§ 6, 7.

⁴ 2 Hawkins' P. C. 70.

⁵ 3 R. S. 741, § 109; Code, § 419.

⁶ R. 878, § 173.

⁷ 2 R. S. 960, §. 1 &c.

⁸ Ante, § 736, &c.

⁹ 2 Hale's Cr. L. 58.

¹⁰ Allen, 371.

¹¹ 2 Hale's Cr. L. 63.

But it is not necessary that an inquest should be held in the case of one dying with a fever, apoplexy, or other disease.¹ The coroner can in no case hold an inquest, except upon view of the body, and when it has been buried, he must dig it up, and after he and the jury summoned to make inquest have viewed it together, he shall cause it to be buried again.²

§ 916. Whenever a convict shall die in any state prison, it shall be the duty of the inspector having charge of the prison, and of the warden, physician and chaplain of the prison, if they or either of them shall have reason to believe that the death of the convict arose from any other than ordinary sickness, to call upon the coroner having jurisdiction, to hold an inquest upon the body of such deceased convict.³ It will, of course be the duty of the coroner, to hold such inquest on a prisoner in a county jail, or other place of confinement of convicts who dies an unnatural death; and it is said that even if he dies a natural death, yet regularly the jailer ought to send for the coroner, to inquire, because it may be possibly presumed, that the prisoner died by the ill usage of the jailer.⁴

CHAPTER II.

CRIMES COGNIZABLE BY CORONERS. *a*

§ 917. When there is a killing or wounding of a human being, it is the duty of the coroner's jury summoned to investigate the case to determine whether the death be murder, manslaughter or justifiable or excusable homicide or suicide, and who are the principals and who the accessaries in the death or wounding. A brief definition of these various crimes will be given.

1. MURDER.

§ 918. The killing of a human being, without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder in the first degree, murder in the second degree, manslaughter or excusable or justifiable homicide, according to the facts and circumstances of such case.⁵

§ 919. Such killing unless it be manslaughter or excusable or justifiable homicide, as hereinafter mentioned, shall be murder in the first degree in the following cases: First, when perpetrated from a pre-

¹ 2 Hale's Cr. L. 57.

⁴ 2 Hale's Cr. L. 57.

² 2 Hawkins' P. C., 77.

⁵ 4 R. S. 661, § 5.

³ 3 R. S. 1093, § 125.

a Ark.—Dig. 1858, p. 271.

Ill.—1 St. 379.

Del.—R. S. 1852, 91.

O.—1 R. S. 401.

meditated design to effect the death of the person killed, or of any human being; Second, when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; Third, when perpetrated in committing the crime of arson in the first degree. Such killing unless it be murder in the first degree or manslaughter, or excusable or justifiable homicide as hereinafter mentioned, or when perpetrated without any design to effect death by a person engaged in the commission of a felony, shall be murder in the second degree.¹

§ 920. When death is perpetrated from a premeditated design to affect the death of one, it makes no difference whether the design is formed at the time of striking the fatal blow, in the heat of passion² or months before. It is enough that the intent precedes the act, although that follows instantly.³ If the only offence of which the prisoner is guilty at the time of the killing, is the beating of the deceased, of which he died, it is for the jury to say whether it be murder or manslaughter.⁴

§ 921. Our statute makes it murder in the first degree as stated, when the killing is perpetrated in committing the crime of arson in the first degree. And arson in the first degree consists in wilfully setting fire to, or burning in the night time, a dwelling house in which there shall be at the time some human being; and every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling house of any person so lodging therein.⁵ But no ware house, barn, shed or other outhouse shall be deemed a dwelling house within the meaning of the statute, unless the same be joined to, immediately connected with, and part of the dwelling house.⁶

§ 922. When an inhabitant or resident of this state, who shall by previous appointment or engagement, fight a duel without the jurisdiction of this state, and in so doing shall inflict a wound upon his antagonist or any other person, whereof the person thus injured shall die within this state, every such person, and every second engaged in such duel, shall be deemed guilty of murder within this state, and may be indicted and tried, and convicted in the county where such death shall happen.⁷

§ 923. To constitute murder there must be an actual killing, and as

¹ 4 R. S. 662, § 6.

² 3 Seld. 396, *The People v. Sullivan*.

³ 3 Seld. 385, *The People v. Clark*.

⁴ 19 Wend. 569, *The People v. Rector*.

⁵ 3 R. S. 936, § 9.

⁶ 3 R. S. 936, § 10.

⁷ 3 R. S. 936, § 6.

a general principle, violence or corporeal damage to the party. But if one does an act, the probable consequence of which may be, and eventually is death, such killing may be murder, although no stroke be struck by him, and no killing may have been previously intended.¹ Thus where a mother of a child leaves it in a remote place, where it is not likely to be found, as on a barren heath, and its death ensues, it is murder.² Or, where a harlot left her child in an orchard, covered it with leaves and it was killed by a kite;³ or where one exposed her child in a pig sty, and it was destroyed;⁴ or where the parish officers shifted a child from parish to parish, until it died from want of care and sustenance;⁵ or where one carried his sick father against his will, in a severe season, from one town to another, by reason of which he died; or where a jailer confined a prisoner, whom he knew never had the small pox, against his will, with one who had it, and he caught it and died.⁶ But, as has been said, as a general rule, there must be some external violence, or corporeal damage to the party; and the mere working upon the fancy of another, or by harsh or unkind usage which puts him into a passion of grief or fear, that he dies suddenly, or contracts a disease which causes his death, the killing is not such as the law can notice.⁷ All homicide is presumed to be malicious until the contrary appear.⁸ Where it appears that one's death is occasioned by the hand of another, it is for that other to show, either by evidence, or inference from the circumstances of the case that the offence is of a mitigated character, and does not amount to murder.

2. MANSLAUGHTER IN THE FIRST DEGREE.

§ 924. The killing of one human being by the act, procurement or omission of another, in cases where such killing shall not be murder under the statute, is either justifiable or excusable homicide or manslaughter.⁹

§ 825. The killing of a human being, without a design to effect death by the act procurement or culpable negligence of any other while such other is engaged,

1. In the perpetration of any crime or misdemeanor not amounting to a felony; or,

2. In any attempt to perpetrate any such crime or misdemeanor, though without design to kill.¹⁰ In cases where such killing would be murder at the common law, is declared manslaughter in the first

¹ Barb. Cr. L. 30.

² 1 Car & M. 164, *Regina v. Walters*.

³ 1 Barb. Cr. L. 31.

⁴ Id. 32.

⁵ Id. 31.

⁶ *Impey*, 51.

⁷ 10 Barb. Cr. L. 31.

⁸ 1 Hill 377, *The People v. McLeod*.

⁹ 3 R. S. 939, § 1

¹⁰ 19 Wend. 569, *The People v. Rector*;
13 Wend. 159, *The People v. Enoch*.

degree.¹ If one beats another, of which he dies, it is for the jury to say whether it is murder or manslaughter.²

§ 926. Every person deliberately assisting another in the commission of selfmurder, shall be deemed guilty of manslaughter in the first degree.³

§ 927. The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.⁴

3. MANSLAUGHTER IN THE SECOND DEGREE.

§ 928. Every person who shall administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, shall, in case the death of such child, or of such woman be thereby produced, be deemed guilty of manslaughter in the second degree.⁵ And whoever shall unlawfully supply or procure any medicine, drug, substance or thing whatever, knowing that the same is intended to be unlawfully used or employed with the intent to procure the miscarriage of any woman, whether she be or be not pregnant, shall be deemed guilty of a misdemeanor, and shall upon conviction, be punished by imprisonment in the county jail not less than three months, nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.⁶ Every person offending against either of the foregoing provisions of the statute shall be a competent witness against any other person so offending, and may be compelled to appear and give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.⁷

§ 929. The killing of a human being, without a design to effect death, in the heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree.⁸ This provision of the statute would seem in-

¹ 3 R. S. 940, § 6.

² 19 Wend. 569, *The People v. Rector*;
Ante, § 920.

³ 3 R. S. 940, § 7.

⁴ 3 R. S. 940, § 8.

⁵ Laws 1869, Ch. 531, § 1.

⁶ Laws 1869, Ch. 631, § 2.

⁷ Laws 1859, Ch. 631, § 3.

⁸ 3 R. S. 940, § 10.

tended to cover all cases of personal combat when there was no design to kill.¹

§ 930. Every person who shall unnecessarily kill another, either,

1. While resisting an attempt by such other person to commit any felony, or to do any other unlawful act; or,

2. After such attempt shall have failed,

Shall be guilty of a manslaughter in the second degree.²

4. MANSLAUGHTER IN THE THIRD DEGREE.

§ 931. The killing of another in the heat of passion, without any design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is hereinafter declared to be justifiable or excusable, shall be deemed manslaughter in the third degree.³

§ 932. The involuntary killing of a human being, by the act, procurement, or culpable negligence of another, while such other person is engaged in the commission of a trespass or other injury to private rights or property, or engaged in an attempt to commit such injury, shall be deemed guilty of manslaughter in the third degree.⁴

§ 933. If the owner of a mischevious animal, knowing its propensities, wilfully suffer it to go at large, or shall keep it without ordinary care, and such animal, while so at large or not confined, kill any human being who shall have taken all the precautions which the circumstances may permit, to avoid such animal, such owner shall be deemed guilty of manslaughter in the third degree.⁵

§ 934. Any person navigating any boat or vessel for gain, who shall wilfully or negligently receive so many passengers, or such a quantity of other lading, that by means thereof such boat or vessel shall sink or overset, and thereby any human being shall be drowned or otherwise killed, shall be deemed guilty of manslaughter in the third degree.⁶

§ 935. If the captain or any other person having charge of any steamboat for the conveyance of passengers, or if the engineer or other person having charge of the boiler of such boat, or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create, or allow to be created, such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking any person shall be killed; every such captain, engineer,

¹ 1 Parker Cr. R. 291, *The People v. Johnson*.

⁴ 3 R. S. 940, § 13.

⁵ 3 R. S. 940, § 14.

² 3 R. S. 940, § 11.

⁶ 3 R. S. 941, § 15.

³ 3 R. S. 940, § 12.

or other person shall be deemed guilty of manslaughter in the third degree.¹

§ 936. If any physician, whether a regular physician or otherwise, while in a state of intoxication, shall, without a design to affect death, administer any poison, drug, or medicine, or do any other act to another person, which shall produce the death of such other, he shall be deemed guilty of manslaughter in the third degree.²

§ 937. If the violation by any person of the act of the legislature relative to the keeping of gunpowder and saltpetre in the city of New York to the southward of a line running through the center of Forty-second street, from the North to the East river, occasions the death of any person or persons, the offender shall, on conviction, be deemed guilty of manslaughter in the third degree.³

5. MANSLAUGHTER IN THE FOURTH DEGREE.

§ 938. The involuntary killing of another, by any weapon, or by means neither cruel nor unusual, in the heat of passion, in any cases other than such as are declared by statute to be excusable homicide, shall be deemed manslaughter in the fourth degree.⁴

§ 939. Every other killing of a human being, by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared by statute to be murder or manslaughter in some other degree, shall be deemed manslaughter in the fourth degree.⁵

6. JUSTIFIABLE HOMICIDE.

§ 940. Such homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either,

1. In obedience to any judgment of a competent court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty, whether in a civil or criminal case; or,⁶
3. When necessarily committed in retaking felons who have been rescued or who have escaped; or,
4. When necessarily committed in arresting felons fleeing from justice.⁷

§ 941. Such homicide is also justifiable when committed by any person in either of the following cases:

¹ 3 R. S. 941, § 16.

² 3 R. S. 941, § 17.

³ 3 R. S. 945, § 42.

⁴ 3 R. S. 941, § 18.

⁵ 3 R. S. 941, § 19.

⁶ 1 Barb. Cr. L. 35.

⁷ 3 R. S. 939, § 2.

1. When resisting any attempt to murder such person, or to commit a felony upon him or her, or upon or in any dwelling house in which such person shall be ; or,

2. When committed in the lawful defence of such person, or of his or her husband, wife, parent, child, master, mistress or servant, when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished.

But one will not be justified in returning blows with a dangerous weapon when he is struck with the naked hand, and there is no reason to apprehend a design to do him a great bodily harm. Nor will it justify homicide when the combat can be avoided, or where, after it has commenced, the party can withdraw from it in safety before he kills his adversary.¹

3. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed ; or in lawfully suppressing any riot ; or in lawfully keeping or preserving the peace.²

But in such case there must be an apparent necessity for killing ; for if the officer or private person were to kill after resistance had ceased, or if there were no reasonable necessity for the violence used on his part, the killing would be manslaughter at least. And if the warrant under which they act, is illegal and void upon its face, or issued with a blank in it, which is filled up after issued, or issued with an insufficient description of the defendant, the officer or private person would not be justifiable in killing the person resisting.³ But it is otherwise if the process is only irregular, and it makes no difference that the charge in the warrant is false ; or that the warrant was obtained by imposition on the magistrate by false information as to the matters contained in it. The officer, too, must be acting in his own district, and not beyond the jurisdiction of the court issuing the process ; and he must see that it is not executed on Sunday, in the cases where such service is forbidden on that day.⁴ Where a private person lends his aid to an officer, whether commanded by him or not, he is under the same protection as the officer himself.⁵ An officer assaulted in the discharge of his duty is not bound, like a private person, to give way ; he must proceed with his duty, and if he necessarily kills his assailant it will be justifiable, though he ought not to come to extremities upon every slight interruption nor without reasonable necessity.⁶

¹ 2 Com. 193, *Shorter v. The People*.

² 3 R. S. 939, § 3.

³ Barb. Cr. L. 35

⁴ Barb. Cr. L. 36

⁵ Barb. Cr. L. 38.

⁶ Barb. Cr. L. 43.

7. EXCUSABLE HOMICIDE.

§ 942. Such homicide is excusable when committed,

1. By accident and misfortune, in lawfully correcting a child or servant; or in doing any other lawful act by lawful means with usual and ordinary caution, and without any unlawful intent; or,

2. By accident and misfortune, in the heat of passion upon any sudden and sufficient provocation, or upon any sudden combat, without any undue advantage being taken, and without any dangerous weapon being used and not done in a cruel or inhuman manner.¹

8. WOUNDING.

§ 943. Every person who, from premeditated design, evinced by laying in wait for the purpose, or in any other manner; or with intent to kill or commit any felony; shall,

1. Cut out or disable the tongue; or,

2. Put out an eye; or,

3. Slit the lip, or slit or destroy the nose; or,

4. Cut off or disable any limb or member,

Of another, on purpose, upon conviction thereof, shall be imprisoned in a state prison, for such term as the court shall prescribe, not less than seven years.²

9. CONCEALING THE DEATH OF A BASTARD CHILD.

§ 944. Any woman who shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, which if born alive would by law be a bastard, whether it was born dead or alive, or whether it was murdered or not, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by imprisonment in a county jail, not exceeding one year.³

10. SUICIDE.

§ 945. Suicide is where one voluntarily kills himself by stabbing, poison, or in any other way. But it is not suicide in one who assists another in committing selfmurder, but manslaughter in the first degree.⁴

11. PRINCIPALS.

§ 946. A principal in the first degree, is the actor or absolute perpetrator of the crime. But it is not absolutely necessary that he should be present, or do the act himself. For if one lays poison purposely for another, who takes it and is killed, he who laid the

¹ 3 R. S. 939, § 4.

² 3 R. S. 943, § 29.

³ 3 R. S. 975, § 22.

⁴ Ante, § 926.

poison, though absent when it is taken, is the principal in the first degree. Neither is it necessary that he should perpetrate the crime with his own hands; for if an offence be committed through the medium of an innocent agent, the employer of the agent, though absent when the act is done, is answerable as principal in the first degree. But if the instrument thus employed be aware of the consequence of his act, and responsible for it, he is a principal in the first degree and the employer, if he be present when the act is committed, is a principal in the second degree; or if absent, an accessory before the fact.¹

§ 947. A principal in the second degree is one who is present aiding and abetting the perpetrator of a crime. To constitute a principal in the second degree, he must be present either actually or constructively, at the commission of the crime. But it is not necessary that he should be an ear or eye witness of the transaction. He is, in contemplation of law, present, aiding and abetting, if with the intention of giving assistance he be near enough to render it should the occasion arise. His presence during the whole time is not necessary.²

12. ACCESSARIES.

§ 948. Accessaries before the fact, are those who being absent at the time of the commission of the offence, yet procure, counsel or command another to commit it. Absence is indispensably necessary to constitute one an accessory; for if he be present, either actually or constructively when the felony is committed, he is an aider and abettor, or principal in the second degree, and not an accessory.³

CHAPTER III.

CORONERS' INQUESTS. ^a

§ 949. Whenever any coroner shall receive notice that any person has been slain, or has suddenly died, or has been dangerously wounded, or has been found dead under circumstances as to require an inquisition, it shall be his duty to go to the place where such person shall be, and forthwith to summon not less than nine, nor more than fifteen

¹ Barb. Cr. L. 283.

² Barb. Cr. L. 282.

^a Ala.—R. C. § 4363.

Ark.—Dig. 1858, p. 271.

Cal.—Dig. 1860, p. 112; Laws 1862,

p. 552.

Del.—R. S. 1866, p. 91.

³ Barb. Cr. L. 285.

Ga.—Code p. 787.

Ill.—2 St. p. 1126; Laws 1869, p. 104.

Ind.—2 R. S. 1852, p. 13.

Ia.—Rev. 1860, p. 46.

persons, qualified by law to serve as jurors, and not exempt from such service, to appear before such coroner forthwith, at such place as he shall appoint, to make inquisition concerning such death or wounding.¹ The place of holding the inquest must be within the county where such body was found, and in which such coroner resides, and may be at any place therein; but it should be at a convenient place for such purpose nearest the body.

§ 950. In England there can be but one inquest upon a body, unless that taken be first set aside by the court. In this state the question is not known to have arisen except on one occasion. A second inquest taken without the first being set aside was declared void on habeas corpus, and the prisoner arrested by the coroner was discharged, in accordance with the common law rule. On appeal to the general term, the court was equally divided on the question and no determination was reached.² One inquisition may be held upon several dead bodies of persons who were killed by the same cause, and who died at the same time.

§ 951. The coroner must summon the jurors in person. It must be done personally, in the same manner as jurors are summoned by a sheriff or other officer, where the selection of the jurors is discretionary with such officer. He should exercise the same care in selecting the jurors, as the officer is required to do in the case of jurors in a civil or criminal proceeding in courts of law. Care should be taken not to summon any person related to the deceased; and if the person who caused the death or wounding is known, or if any suspicion is entertained who he is, no person related to, or connected with such person, should be summoned; nor should any one who is known to be prejudiced for or against him, be summoned to act as a juror upon the inquisition. The same care should be observed in such case to obtain a fair and impartial verdict, as upon the trial of the party accused of the offence. But the jurors who are selected and appear, are not challengeable by either party.³

¹ R. S. 1036, § 1; T. W. Charleton, (Ga.) R. 310.

² 4 Parker Cr. R., 519. *The People v Budge*.

³ Hale's Cr. L. 59.

Kan.—Gen. St. 1860, 281.

La.—R. S. 107.

Me.—R. S. 724.

Md.—1 Code, 145.

Mass.—St. 1860, p. 848; Sup. 244.

Minn.—Rev. 1866, p. 133.

Miss.—Rev. Code, p. 128.

Mo.—Gen. St. 1865, p. 391; Laws 1868, p. 27.

Neb.—R. S. p. 32.

N. H.—Gen. St. 1867, p. 449.

N. J.—Dig. 1858, p. 134; Laws 1856, p. 228.

O.—2 R. S. 1400, 1604.

On.—Gen. L. 518.

R. I.—R. S. 569.

Tenn.—Code p. 935.

Va.—Code. 1849, p. 757.

§ 952. The coroner has power to issue subpœnas for witnesses, returnable either forthwith, or at such time and place as he shall appoint therein; and it shall be the duty of the coroner to cause some surgeon or physician to be subpœnaed to appear as a witness upon the taking of such inquest.¹ Such subpœnas may be served by the coroner himself, or by any other officer or person as in other cases. The manner of service of the subpœna is by reading the same to the witness, or stating the contents thereof to him, as already pointed out.² The witnesses are not entitled to any fees for their attendance. Every person served with any such subpœna shall be liable to the same penalties for disobedience thereto, and his attendance may be enforced in the like manner as upon a subpœna issued in justice's courts.³ The manner of compelling the attendance of witnesses in such cases will be hereafter pointed out.⁴

§ 953. Whenever six or more of the jurors shall appear, they shall be sworn by the coroner and charged by him,⁵ to inquire how and in what manner, and when and where, such person came to his death, or was wounded, (as the case may be,) and who such person was, and into all the circumstances attending such death or wounding; and to make a true inquisition, according to the evidence offered to them, or arising from the inspection of the body.⁶

§ 954. After the jury have been thus sworn and charged by the coroner, they, with the coroner, go together to view and examine the body of the deceased, or the wounded person. It will not be sufficient that they view the body separately and at different times.⁷ And they cannot proceed upon the inquest until they shall have so viewed the body, and if it be buried it must be dug up.⁸ It is not necessary that the inquest should be held where the body is found, but after the body has been so viewed, the jury may return to some convenient place to hear the testimony of witnesses, and deliberate upon their verdict.⁹

§ 955. The coroner swears or affirms the witnesses produced before the jury, and examines them and reduces their testimony to writing.¹⁰ Counsel may be present and assist the coroner in the examination of the witnesses; and the jurors may, if they see fit, put any proper questions to the witnesses. But the party suspected or charged with the crime, has no right to produce witnesses on the inquest, or to cross examine those produced on behalf of the people, by himself or

¹ 3 R. S. 1036, § 3.

² Ante § 196.

³ 3 R. S. 1036, § 4.

⁴ Post, § 1069, &c.

⁵ 2 Hale's Cr. L. 60.

⁶ 3 R. S. 1036, § 2.

⁷ 3 Barn. & A. 260, *The King v. Fer-*
rand.

⁸ 2 Hale's Cr. L. 58.

⁹ Hawkins' P. C. 78.

¹⁰ 3 R. S. 1037, § 8.

counsel. Nor is it necessary that he should be present during the examination.¹ But it will be the duty of the coroner to examine any witnesses he may have reason to believe may know anything concerning the matter pertinent to the inquiry, and to put to any witness any proper and pertinent question that such party may desire. Such party, however, may be attended by counsel on the inquest, to advise with him as to his rights as to answering any question that may be put to him, when under examination. If the party accused of the crime be present at the inquest, and is there charged with the crime, or the testimony fastens the crime upon him, and he is called upon by the coroner to testify, it is his duty first to inform the accused that he is at liberty to refuse to answer any question that he may put to him, otherwise his answers on such examination cannot be read in evidence against him when on trial for the offence. But if such person is not under arrest, or charged with the crime, his answers may be given in evidence against him on his subsequent trial for the alleged murder, though the coroner may not have so advised him, of his rights.² The jury must hear all the evidence offered before them, whether it be in favor or against any party suspected of the killing or wounding, for the jury is to find all the circumstances attending the killing or wounding.³

§ 956. Upon the investigation, the coroner's jury is not limited in their inquiry, like a jury upon the trial of one charged with the crime. Their duty is to determine if a crime has, or has not been committed, and who perpetrated or who caused the same to be perpetrated, and all the circumstances attending it; and any proper testimony tending in any degree to throw light upon the subject may be properly given. Still, nothing but legal testimony should be taken; and mere matter of opinion, as to who the offender is, should not be permitted, nor should hearsay evidence be indulged in.

§ 957. The coroner may cause a post mortem examination of the body to be made by the surgeon or physician subpoenaed before him, if it shall be necessary, and the expense thereof shall be a county charge. But if there is no agreement, the coroner is primarily liable to the surgeon.⁴

§ 958. The testimony of all witnesses examined before a coroner's jury, shall be reduced to writing by the coroner. The whole of the testimony should be taken down, in due form, and each examination must have a jurat showing that the witness was duly sworn, or affirmed

¹ 20 How. 111, *The People v. Collins*.

² *Henderson's case*.

³ *Hale's Cr. L.* 60, 62.

⁴ 45 Barb. 197, *Van Hoevenbergh v. Hasbrouck*.

by the coroner, or it will not be read in evidence upon the trial; and a deposition in pencil is irregular.¹

§ 959. The jury, upon the inspection of the body of the person dead or wounded, and after hearing all the testimony offered before them, shall retire, as jurors in other cases, and deliberate upon their verdict. They must not suffer any one, not even the coroner, to mingle with them in their deliberations. But they may, as in the case of jurors in courts of law, take the opinion of the coroner upon any question of law that may arise upon the investigation.

§ 960. When the jury shall have agreed upon a verdict, they shall reduce their inquisition to writing, which shall show before what coroner the same was taken, and that the same was taken upon the oath of good and lawful men of the county, who were first duly sworn;² and it must also show when and where the same was executed. They shall also therein find and certify how and in what manner, and when and where the person so dead or wounded came to his death, or was wounded, (as the case may be,) and who such person was, and all the circumstances attending such death or wounding, and who were guilty thereof either as principal or accessory, and in what manner.³ The jury however, are not required to find who were accessories after the fact, but they need only inquire of those before the fact.⁴ If the person who is found dead or wounded is unknown; or the person who caused the death or wounding is unknown, the jury shall so find.⁵ And they shall find, if the fact so appears before them, whether the killing was accidental or suicide, murder or manslaughter, or excusable or justifiable homicide; and if the manner of the death is unknown, they shall so state. Such inquisition shall then be signed by such jurors and the coroner. If the names of the jurors are not set out at length in the caption, they must sign their names at length and not merely the initials of their christian name.⁶ If some of the jurors sign with their mark, such signature should properly be attested, but it will be taken *prima facie*, that the signing was in the presence of each other.⁷ Where there are two or more on the inquisition of the same name, it is not necessary to designate them by their abode or addition.⁸

§ 961. It is not necessary that the jury should be kept together until they shall have agreed upon a verdict, for if there appears to be an irreconcilable difference of opinion as to any material fact amongst

¹ 22 Wend. 167, *The People v. White*.

² 2 Hawkins' P. C. 77.

³ 3 R. S. 1036, § 5.

⁴ 2 Hawkins' P. C. 78; 2 Hales' Cr. L. 63.

⁵ 2 Hale Cr. L. 63.

⁶ 3 Car. & P. 602, *Rex v. Bowen*; 6 Car. & P. 179, *Rex v. Bennett*.

⁷ 2 Lewin's C. C. 125, *Lewen's case*.

⁸ 7 Car. & P. 538, *Rex v. Nicholas*.

the jurors, concerning which they are to make inquest, the jurors agreeing in opinion, may find accordingly, and may present two or more inquisitions.

§ 962. If the jury find that any murder, manslaughter, or assault has been committed, the coroner shall bind over the witnesses to appear and testify at the next criminal court, at which an indictment for such offence can be found, that shall be held in the county.¹ He shall, however, bind over only those witnesses who testify to some material fact against the accused, and not those who are called for the purpose of exculpating him.² Such recognizances shall be in writing and shall be subscribed by the parties to be bound thereby. The statute directing the taking of such recognizances does not in terms, empower the coroner, as in the case of the examination of a criminal by a magistrate, to commit such witnesses in case of the refusal to do so, and coroners had no such right at the common law.

§ 963. The testimony of all witnesses examined before a coroner's jury, shall, as has been seen, be reduced to writing by the coroner, and shall be returned by him, together with the inquisition of the jury, and all recognizances and examinations taken by such coroner to the next criminal court of record that shall be held in the county.³ In practice, such testimony, inquisition and recognizances are returned by the coroner forthwith to the clerk of the county, and filed in his office.

§ 964. If there be no friends of the deceased, to take charge of the body, it is the duty of the coroner, after the same has been duly viewed by him and the jury, to see that it is properly buried, and the expense incurred thereby is a county charge. And so it is the duty of the coroners of the several counties in this state to take charge of all moneys and other valuable things which have been or may hereafter be found with or upon the bodies of persons on whom inquests shall be held, where there is no other person entitled to take charge of the same, and every such coroner shall deliver over to the treasurer of their respective counties all such moneys and other valuable things which shall not have been claimed by the legal representatives of such person or persons within sixty days after the holding of such inquest; and in default thereof, the said treasurer shall be authorized and is required to institute the necessary proceedings to compel such delivery.⁴

§ 965. The several treasurers to whom any such valuable thing shall be delivered as aforesaid, shall as soon thereafter as may be,

¹ 3 R. S. 1037, § 6.

² 9 Car. & P. 672, *Regina v. Taylor*.

³ 3 R. S. 1037, § 8.

⁴ 3 R. S. 1037, § 10.

convert the same into money, and place the same to the credit of the county of which he is treasurer; and if demanded within six years thereafter, by the legal representatives of the person on whom the same was found, the said treasurer, after deducting the expenses incurred by the coroner and all other expenses of the county in relation to the same matter, shall pay the balance thereof to such legal representatives.¹

§ 966. Before auditing and allowing the accounts of such coroners the supervisors of the county shall require from them, respectively, a statement in writing, containing an inventory of all money and other valuable things found with or upon all persons on whom inquests shall have been held, and the manner in which the same has been disposed of, verified by the oath or affirmation of the coroner making the same, that such statement is, in all respects, just and true, and that the money and other articles mentioned therein have been delivered to the treasurer of the county, or to the legal representatives of such person or persons.²

§ 967. The said coroners shall be entitled to receive a reasonable compensation for making and rendering such statement, and for their trouble and services in the preservation and delivery of said effects and property, and all reasonable expenses incurred by them in relation thereto, to be audited by the board of supervisors, in addition to the fees or compensation to be allowed by them for holding an inquest.³

CHAPTER IV.

ARREST AND EXAMINATION OF OFFENDERS.

§ 968. If the jury of inquest find that any murder, manslaughter, or assault has been committed, and the party charged with such offense be not in custody, the coroner shall have power to issue process for his apprehension, in the same manner as justices of the peace,⁴ and shall have the same power to examine the defendant as is possessed by a justice of the peace, and shall in all respects proceed in the like manner.⁵

§ 969. The warrant of arrest must be under the hand of the coroner, with or without his seal, and should recite the finding of the jury upon the inquest, and be directed to the sheriff, or to any constable or marshal of the county, and commanding the officer to whom it shall be directed, forthwith to take the person accused of having committed

¹ 3 R. S. 1037, § 11.

² 3 R. S. 1837, § 12.

³ 3 R. S. 1038, § 13.

⁴ 3 R. S. 1037, § 6.

⁵ 3 R. S. 1037, § 7.

such offence, and to bring him before such coroner to be dealt with according to law.¹

§ 970. The warrant of the coroner shall be executed in the same manner, and in the same places as criminal process, issued by a justice of the peace. And if it is executed out of the county in which such coroner resides, it would seem that it should be indorsed by a magistrate of the county in which the same is executed, as the warrant of a justice of the peace;² though, as the offence charged, would of course be felony, the officer making the arrest might justify such arrest without warrant.³

§ 971. When the arrest is made, the prisoner must be brought forth-with before such coroner by the officer, for examination. If the coroner is absent, or has gone out of office, the prisoner should be brought before a magistrate of the county, and the officer making the arrest should make return of such arrest upon his warrant, and should also therein show the absence of the coroner, or the vacancy in his office.⁴

§ 972. When the prisoner shall have been brought before the coroner, he shall first be informed of the charge made against him, and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination.⁵ It has been held that the coroner can only take the examination of the prisoner, and is not authorized to examine witnesses either against the prisoner or for him; and that he has no right to determine the innocence of the prisoner contrary to the finding of the jury.⁶

§ 973. The examination of the prisoner shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge against him, and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination of the prisoner.⁷ At the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him.⁸ And the answers of the prisoner to the several interrogatories shall be reduced to writing by the coroner, or under his direction; they shall be read to the prisoner, who may correct or add to them, and when made conformable to what he declares is the truth, shall be certified and signed by the coroner.⁹ The prisoner should be requested to sign such examination also, but if he refuses to do so he cannot be compelled.

¹ 3 R. S. 993, § 3.

² Ante, § 62.

³ Ante, § 49.

⁴ Ante, § 72.

⁵ 3 R. S. 995, § 14.

⁶ 20 How. 111, *The People v. Collins*.

⁷ 3 R. S. 995, § 14.

⁸ 3 R. S. 995, § 15.

⁹ 3 R. S. 995, § 16.

§ 974. On completing the examination of the accused, the coroner issues his warrant for the commitment of the prisoner to the jail of the county.¹ And he shall return the examination taken by him to the next court, having cognizance of the offence, and in which the prisoner may be indicted; and if he shall neglect or refuse to make return to the proper court, he may be compelled by rule forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment, as for a contempt of court.² If the offence be bailable and the prisoner desires to give bail, he shall be taken before some officer or court authorized to take bail in the particular case.

CHAPTER V.

EXECUTION OF PROCESS WHERE SHERIFFS ARE PARTIES.

§ 975. Whenever the sheriff of any county shall be a party in any suit, all process in such suit, except when otherwise provided by law, shall be executed by the coroner of the county, to whom the same shall be delivered, in the same manner in all respects, subject to the same obligations and liabilities, and with the like authority and entitled to the same privileges, as are prescribed by law in respect to sheriffs, except in cases otherwise specially provided for.³ The mere fact that a deputy of the sheriff is a party to a suit, does not render the sheriff a party thereto, so as to authorize or require the service of process therein by the coroner. Nor does it make any difference that the suit is against the deputy for an official act or neglect of duty.⁴ And a coroner may serve process on the sheriff, when he is a party to a suit, though such coroner is one of his own deputies.⁵ The power of the coroner to serve process, being special, the burthen of proof is on the party insisting on the regularity of his proceedings, to show that he acted within his authority.⁶ The coroner is not required to serve process on the sheriff when the suit is in a justice's court.⁷

§ 976. In all cases where a judgment shall be obtained in any court against the sheriff of any county, either singly or with others, instead

¹ 3 R. S. 996, § 26.

² 3 R. S. 996, §§ 28, 29.

³ 3 R. S. 741, § 109; Code, § 429; 1 Gray (Mass.) 51, *Adams v. Vose*.

⁴ Ante, § 2.

⁵ 7 Mass. 475, *Colby v. Dillingham*.

⁶ 19 Pick. 339, *The Commonwealth v. Moore*.

⁷ 17 Wis. 401, *Cron v. Krones*.

^a Ala.—R. C. § 941, 2844.

Cal.—Dig. 1860, p. 112.

Fa.—Laws 1859, p. 15.

Ia.—Rev. 1860, p. 66.

Ill.—2 St. p. 1126.

Me.—R. S. 489.

Md.—1 Code 145.

Mich.—St. 1857. p. 210.

Minn.—Rev. 1866, p. 134.

Miss.—Rev. Code, p. 131.

Mo.—Gen. St. 1865, p. 391.

Neb.—R. S. 32.

N. J.—Dig. 1855, p. 748.

N. C.—Rev. Code, 557.

Wis.—R. S. 164.

of directing the execution thereon to the coroner of the county, it may be directed and delivered to any person (except a party in interest in the suit) who shall be designated by the court in term, by an order to be entered in the minutes, or by any judge thereof in vacation, by an order to be indorsed on such execution.¹ The person so designated, and receiving such execution to execute the same, shall, in respect to such execution, be deemed a coroner of the county, and shall be liable in all respects to all the provisions of law respecting sheriffs, so far as the same may be applicable.²

§ 977. So, when the sheriff and coroners are parties in the suit or proceeding, the court will, upon the application of the party requiring the service, appoint some suitable person called an elisor, to make the service.³ It is not necessary that the elisor should be a resident of the same county with the officer upon whom he is appointed to serve process. Thus, a person residing in Albany county, has been appointed an elisor to execute an attachment upon the sheriff of Niagara county.⁴

§ 978. When process shall be directed to the coroners of a county generally, the same may be executed, and a return thereto may be made and signed by any one of such coroners; but such act or return shall in no degree prejudice the other coroners not participating therein.⁵

§ 979. The coroner to whom any such process shall be delivered for execution, shall execute the same in all respects and be subject to the same obligations and liabilities, and with like authority, and be entitled to the same privileges as are prescribed by law in respect to sheriffs, except in cases otherwise expressly provided for.⁶

§ 980. Whenever an action of replevin shall be brought against the sheriff of any county, the writ and all process in the cause shall be awarded to, and be executed by the coroners of the county, but executions therein shall be awarded and executed as in other such cases.⁷

§ 981. If process for arresting the sheriff of the county, be delivered to a coroner, he shall execute the same in the same manner prescribed by law in respect to the execution of similar process by sheriffs; and shall be authorized to take a bond on the arrest, or a bond for the jail liberties to himself, in the name of his office, in the same cases and in the same manner, in which a sheriff would be

¹ 3 R. S. 643, § 11.

² 3 R. S. 643, § 12.

³ Sewell 96.

⁴ 20 Wend. 102, Anon.

⁵ 3 R. S. 742, § 110.

⁶ 3 R. S. 741, § 109; Code, § 419.

⁷ 3 R. S. 849, § 28.

authorized to take the same; which bonds shall have the like effect, and be subject to the same provisions, as bonds taken in like cases by sheriffs; and the proceedings, rights, and liabilities thereon, shall be the same in all respects.¹ If the sheriff is arrested by the coroner, under a judge's order under the provisions of the Code, he shall take an undertaking on discharging him from arrest, in the case where a bond would be required under the foregoing provisions of the statute.² If an attachment be issued against the sheriff for not returning an execution, while he is in the coroner's custody by virtue of an execution, he should return that fact to the attachment, and the court will order an alias attachment and a writ of habeas corpus, to bring up the body, that he may answer to the contempt.³

§ 982. If a sheriff, on being arrested by a coroner on civil process, requiring him to be held to bail, shall refuse or neglect to give the bond or undertaking required by law, or make the necessary deposit,⁴ to entitle him to be discharged; or if a sheriff shall be arrested on execution against his body, or an attachment, he shall be confined by the coroner in some house situated within the liberties of the jail of the county, other than the house of such sheriff, or the jail of such county, in the same manner as sheriffs are required by law to confine prisoners in jails of their counties respectively.⁵ Such house shall thereupon become the jail of the county, for the use of such coroner, and all laws relating to the jails of such counties, shall be applicable to the same, while such sheriff shall be confined therein.⁶

§ 983. For any escape of such sheriff from such house, the coroner shall be liable, in the same manner and to the same extent, as sheriffs for the escape of other prisoners, and may plead and give in evidence the same matters allowed to sheriffs in similar actions.⁷

§ 984. A sheriff so confined shall be admitted to the liberties of the jail of the county, established for other prisoners, in the same cases, and upon executing the like bond to the coroner in whose custody he shall be, as provided in other cases. For any escape of such sheriff from such liberties, the coroner shall be liable in the same manner and to the same extent as sheriffs for similar escapes, and may plead and give in evidence the same matters allowed by law to sheriffs.⁸ And it has been held, that where a coroner instead of confining such sheriff in such house, delivered him to the keeper of the

¹ 3 R. S. 742, § 111.

² Ante, §§ 327, &c.

³ 22 Wend. 635, Anon.

⁴ Ante, §§ 327 &c.

⁵ 3 R. S. 742, § 112; 6 John. 22, Day v. Brett.

⁶ 3 R. S. 742, § 113.

⁷ 3 R. S. 742, § 114.

⁸ 3 R. S. 742, § 115.

jail of the county, and he released him, that such coroner was liable for an escape.¹

§ 985. The coroner may prosecute any such bond taken by him, and shall be entitled and subject to all the provisions of law, in respect to similar bonds taken by sheriffs; and such bonds may be assigned by him to the party at whose suit such sheriff shall have been arrested, and the same proceedings shall be had thereon, in all respects, as on bonds taken or assigned by sheriffs in similar cases.²

§ 986. If any person be arrested by a coroner on process, issued in a suit in which the sheriff of the county is a plaintiff, he shall be committed to the common jail of the county, in cases where a commitment is required by law; but such coroner shall not be liable for any escape of such prisoner from such jail, after he shall have been committed thereto.³

§ 987. Such prisoner, who is so committed, shall be kept in all respects, as other prisoners committed on civil process, and shall be entitled to be discharged, if he be committed on mesne process, on executing a bond to the coroner in the same manner, and in the same cases, in which such bond is required to be given to a sheriff, which shall have the like effect and be proceeded on in the same manner, in all respects.⁴

§ 988. Such prisoner shall be entitled to the liberties of the jail, in the same cases as other prisoners, on executing to the coroner a bond, in all respects similar to that required to be given to sheriffs, which shall have the like effect, and shall be assigned and proceeded on in the same manner.⁵

§ 989. For any escape of such prisoner from such liberties, the coroner shall be answerable, in the same manner, and to the same extent as sheriffs for similar escapes, and may plead and give in evidence the same matters.⁶

§ 990. In a case where the coroner is required to commit a prisoner to the county jail, he will have discharged his duty on delivering or offering to deliver such person to the sheriff of the county, at such jail, with a certified copy of his process; and if the sheriff or his jailer, refuses or neglects to receive such prisoner and he remains at large, it is an escape for which the sheriff is liable.⁷

§ 991. The case of an arrest of the plaintiff in an action against the sheriff, where there is a judgment in favor of the latter for costs

¹ 6 John. 22, *Day v. Brett*.

² 3 R. S. 742, § 116.

³ 2 R. S. 743, § 117.

⁴ 2 R. S. 743, § 118.

⁵ 2 R. S. 743, § 119.

⁶ 2 R. S. 743, § 120.

⁷ 5 Mass. 310, *Colby v. Sampson*.

does not seem to have been provided for by statute.¹ At the common law the coroner's house is his jail, and his prisoners are to be confined therein. The party in such case, therefore, must be committed to such house, and not to the jail, and he cannot be permitted to be discharged upon the liberties of the jail.²

CHAPTER VI.

WHEN CORONERS TO EXECUTE THE OFFICE OF SHERIFF. ^a

§ 992. Whenever a vacancy shall occur in the office of sheriff of any county, and there shall be no under sheriff of such county then in office, or the office of such under sheriff shall become vacant, or he become incapable of executing the same, before another sheriff of the same county shall be elected, or appointed, and qualified, and there shall be more than one coroner of such county then in office, it shall be the duty of the county judge of the county, forthwith to designate one of such coroners to execute the office of sheriff of the same county, until a sheriff thereof shall be elected or appointed, and qualified. Such designation shall be by instrument in writing, and shall be signed by the judge, and filed in the office of the clerk of the county, who shall immediately give notice thereof to the coroner.³

§ 993. The coroner so designated, within six days after receiving such notice, shall execute with sureties, a joint and several bond to the people of this state, which shall be in the same amount, and with the same number of sureties, and be approved in the same manner, and be subject in all respects to the same regulations, as the security required by law from the sheriff of such county. And after the execution of such bond, the coroner so designated shall execute the office of sheriff of the same county, until a sheriff shall be duly elected or appointed and qualified.⁴

§ 994. If the coroner so designated shall not within the time above

¹ Ante, § 986.

² 6 John. 22, Day v. Brett.

³ 1 R. S. 873, § 173; 12 Ill. 24, Greenup v. Stokes.

⁴ 1 R. S. 873, § 174.

^a Ala.—R. C. 1867, §§ 824, 939.

Cal.—Dig. 1860, p. 112.

Del.—R. S. 1852, pp. 89, 91.

Fa.—Dig. 1847, p. 60.

Ind.—2 R. S. 1852, p. 13.

Ill.—2 St. 1126.

Kan.—Gen. St. 1868, p. 280.

La.—R. S. 107.

Mass.—St. 1857, p. 210.

Minn.—Rev. 1866, p. 134.

Miss.—Rev. Code, p. 131.

Mo.—Gen. St. 1865, p. 391.

Neb.—R. S. 1866, p. 32.

N. H.—Gen. St. 1867, p. 400.

N. J.—Dig. 1855, p. 748.

N. C.—Rev. Code, 557.

O.—2 R. S. 1400, 1403.

On.—Gen. L. 396.

Tenn.—Code, pp. 140, 143.

Va.—Code, 1849, p. 249.

Wis.—R. S. 164.

specified, give such security as is above required, it shall be the duty of the county judge to designate in like manner, another coroner of the county, to assume the office of sheriff; and in case it shall be necessary so to do, the county judge shall proceed to make successive designations, until all the coroners of the county shall have been designated to assume the office. And all the provisions contained in the last two sections shall apply to every such designation, and to the coroner named therein.¹

§ 995. Whenever any such vacancies shall occur in the offices both of sheriff and under sheriff of any county, if there shall be but one coroner of such county then in office, such coroner shall be entitled to execute the office of sheriff of the county, until a sheriff shall be duly elected or appointed, and qualified; but before he enters upon the duties of such office, and within ten days after the happening of the vacancy in the office of the under sheriff, he shall execute with sureties, a joint and several bond to the people of this state, in the same amount, and with the same number of sureties, as may be required by law from the sheriff of such county; and such bond shall be subject in all respects, to the same regulations as the security required from the sheriff.²

§ 996. If such coroner solely in office on the happening of such vacancies, shall neglect or refuse to execute such bond within the time above specified; or if all the coroners, where there are more than one in office on the happening of such vacancies, shall successively neglect or refuse to execute such bond within the time required, it shall be the duty of the county judge of the county in which such vacancy shall exist, to appoint some suitable person to execute the office of sheriff of the same county, until a sheriff shall be duly elected or appointed and qualified.³

§ 997. Such appointment shall be in writing, under the hand and seal of the county judge, and shall be filed in the office of the county clerk, who shall forthwith give notice thereof to the person so appointed.⁴

§ 998. The person so appointed, shall, within six days after receiving notice of his appointment, and before he enters on the duties of the office, give such security as may be required by law of the sheriff of such county, and subject to the same regulations; and after such security shall have been duly given, such person shall execute the office of sheriff of the county until a sheriff shall be duly elected or appointed, and qualified.⁵

¹ 1 R. S. 879, § 175.

² 1 R. S. 879, § 176.

³ 1 R. S. 879, § 177.

⁴ 1 R. S. 879, § 178.

⁵ 1 R. S. 879, § 179.

§ 999. Until some coroner designated, or some person appointed by the county judge shall have executed the security above prescribed; or until a sheriff of the county shall have been duly elected or appointed, and qualified, the coroner or coroners of the county in which such vacancy shall exist, shall execute the office of sheriff of the same county.¹

§ 1000. Whenever any under sheriff, coroner, coroners or other person shall execute the office of sheriff, pursuant to either of the foregoing provisions, the person so executing the office shall be subject to all the duties, liabilities and penalties imposed by law upon a sheriff duly elected and qualified.²

¹ 1 R. S. 879, § 180.

² 1 R. S. 879, § 181.

THE DUTIES OF CONSTABLES.

CHAPTER I.

OF THE ELECTION AND DUTIES OF CONSTABLES. ^a

§ 1001. There are different descriptions of constables known to the laws of this state:

1. Town constables, elected by the several towns at the town meetings held therein, annually;

2. High constables, police constables, and marshals of the several cities and villages, elected or appointed under the provisions of their respective charters.

§ 1002. The former class of constables, in addition to being peace officers of the county, are the ministerial officers of the justices' courts of the several towns in the county, and who are authorized and required to execute all process issuing from such courts in civil cases. Special powers and duties have also been imposed upon them by statute in

^a Ala.—R. C. §§ 149, 221, 298, 309, 316, 482, 759, 846-852, 3213, 3214, 3240.

Ark.—Dig. 1858, pp. 235, 841.

Cal.—Dig. 1860, p. 92; 4 Cal. 188, Taylor v. Brown; Laws 1861, p. 28.

Conn.—Rev. 1866, pp. 28, 111, 124.

Del.—R. S. 1852, p. 95.

Fa.—Dig. 1847, p. 475; Laws 1863, pp. 1, 9.

Ga.—Code, 108.

Ill.—1 St. 226, 330, 333, 684; 2 St. 799.

Ia.—Rev. 1860, pp. 38, 75, 79, 478.

Ind.—1 R. S. 1852, pp. 166, 223; 2 R. S. p. 480; Laws 1855, p. 52.

Kan.—Gen. St. p. 812.

Ky.—R. S. 253.

La.—R. S. p. 105.

Me.—R. S. 489.

Md.—Code, 125, 220.

Mass.—St. 1860, p. 160; 1 Pick. (Mass.) 129, Barre v. Greenwich.

Mich.—St. 1857, p. 241.

Minn.—Rev. 1866, 118, 134, 144, 424.

Miss.—Rev. Code 91, 129, 134.

Mo.—Gen. St. 1865, p. 699.

Neb.—R. S. 1869, pp. 30, 376, 584.

Nev.—St. 1866, pp. 233, 249.

N. H.—Gen. St. 1867, pp. 97, 401.

N. J.—Dig. 1853, pp. 108, 119, 390,

N. C.—Rev. Code, 128, 437, 444.

O.—2 R. S. 1867; 2 O. R. 409, Barrett v. Reid; 10 O. R. N. S. 645, Hartford v. Bennett.

Penn.—Dig. 1861, p. 181.

R. I.—R. S. 423.

S. C.—St. 1863, p. 16.

Tenn.—Code, p. 144.

Vt.—Gen. St. 1863, p. 115.

Va.—Code, 1849, p. 247; Laws 1862, p. 64.

W. Va.—St. 1863, p. 186.

Wis.—R. S. 162, 389, 367, 649.

other matters and proceedings. Those not already enumerated in speaking of the duties of the sheriffs and coroners, will be pointed out hereafter under the appropriate heads. Though elected in and for the town in which they reside, their territorial jurisdiction extends throughout the county.¹

§ 1003. The duties of the second class of constables usually relate to the police of their respective corporations, and are of a criminal character; though some of them are specially authorized by law to execute civil process within the limits of such corporations. In other cases, their duties and powers are made coextensive with those of town constables. In all these cases however, their powers, duties and responsibilities in the execution of civil process, are the same within the prescribed limits. In general, they are removable from office by the common council or board of trustees of their respective corporations, and vacancies in the office are filled by such boards respectively.

§ 1004. Constables must possess the same qualifications as sheriffs.² In addition thereto, such constables must be residents and electors of the towns for which they are chosen.³ But a constable is not, like the sheriff, limited to one term of office, for he may be chosen for successive years. Nor is he prohibited from holding any other office at the same time, unless it should be incompatible with the office of constable.

§ 1005. The statute declares that there shall be chosen at the annual town meeting in each town in this state, so many constables, not exceeding five,⁴ as the electors of such town may determine.⁵ Such determination of the number must be made by a formal vote or resolution of the electors of the town; and is usually made by the adoption, *viva voce*, of a resolution to that effect, before the opening of the polls, by the duly qualified electors of the town then present. If the number of constables to be chosen are not thus limited by the formal vote of the meeting, the five highest candidates voted for at such meeting, will be deemed to be chosen.⁶ It is not necessary however, that the number should be limited in each year. The determination in the manner prescribed, that a less number shall be chosen, will be a valid determination for subsequent years, and until such town shall, at a regular town meeting determine otherwise. When any town meeting shall have limited the number of constables, either at said

¹ 6 Cow. 642, *The People ex rel. Ingersoll v. Garey*; 1 John. 502, *Mills v. Kennedy*.

² Ante, § 2; 23 Wend. 490, *Greene v. Burke*.

³ 1 R. S. 825, § 31.

⁴ 1 R. S. 815, § 3; Laws 1866, Ch. 30.

⁵ 1 R. S. 815, § 3.

⁶ 9 Wend. 333, *The People ex rel. Morris v. Adams*.

meeting, or at any previous one, all ballots cast for a greater number of candidates are held to be void.¹ And if the town meeting determine that the number of constables shall be three, but elect only two, the two chosen oust all the constables of the previous year.² The cities and larger villages, are usually authorized by their charters, to choose a larger number of constables than the towns. In the city of New York, constables are chosen for two years,³ and are now designated as marshals.⁴

§ 1006. Constables hold their office for one year, and until others are chosen or appointed in their places, and have qualified.⁵ But the election of a less number of constables at a town meeting, than the town is entitled to choose, will oust all the constables in office.⁶ When a constable is appointed to fill a vacancy then existing, he holds until another is chosen or appointed in his place.⁷

§ 1007. If any town shall neglect at its annual town meeting, to choose all or either of the constables it may be entitled to elect, it shall be lawful for any three justices of the peace of the said town, by warrant under their hands and seals, to appoint such constables; and the persons so appointed shall hold their respective offices until others are chosen or appointed in their places, and shall have the same powers and be subject to the same duties and penalties, as if they had been duly chosen by the electors.⁸ Such right to appoint exists where the town fails to elect by reason of a tie vote. The justices making such appointment, shall cause such warrant to be forthwith filed in the office of the town clerk, who shall forthwith give notice to the person appointed.⁹

§ 1008. Vacancies in the office of constables by reason of refusal or inability to serve, death, resignation or removal, shall be supplied by the justices of the town, in the manner mentioned in the foregoing section.¹⁰ Whenever a vacancy shall so occur in any such office, and there shall be less than three justices residing in the town in which such vacancy shall occur, the justice or justices residing in such town may associate with themselves one or more justices of the peace from any adjoining town, as may be necessary to make the number of three; and such three justices shall have the like power to fill such vacancy, as if they were respectively justices of the town in which the vacancy occurred.¹¹

¹ 8 Wend. 396, *The People ex rel. Swan v. Loomis*.

² 17 Wend. 81, *The People ex rel. Platner v. Jones*.

³ Laws 1860, Ch. 324.

⁴ Laws 1862, Ch. 484.

⁵ 1 R. S. 827, § 55.

⁶ *Ante*, § 1005.

⁷ 1 R. S. 828, § 56.

⁸ 1 R. S. 828, § 56.

⁹ 1 R. S. 828, § 57.

¹⁰ 1 R. S. 828, § 61.

¹¹ 1 R. S. 829, § 62; 18 Wend. 515, *The People ex rel. Simpson v. Van Horne*.

§ 1009. In the cities and villages of this state, vacancies in the office of constable are filled as in the case of police constables of such cities or villages, by the common council of such city, or board of trustees of the village, except in the city of Albany, where, if a vacancy in such office exists for more than two weeks, the justices of the justices' court shall fill the same.¹

§ 1010. If the name of any constable chosen at an annual town meeting, be on the poll list as a voter, the public reading of the statement of the result of the election by the town clerk, when the canvass shall be completed, as required by law, shall be deemed notice of the result of such election, to such constable.² But if the name of the person so chosen be not upon the poll list as a voter, the clerk of the town meeting within ten days thereafter, shall transmit to such person a notice of his election.³ If such constable shall have been appointed by the justices of the peace, in the case of a failure to elect, or to fill a vacancy in the office, then the town clerk shall, upon the filing with him by the justices of their warrant of such appointment, forthwith give notice to the person appointed.⁴

§ 1011. Every person chosen or appointed to the office of constable, before he enters upon the duties of his office, and within eight days after he shall be notified of his election or appointment, shall take and subscribe the oath of office prescribed by the constitution.⁵ Such oath may be subscribed and sworn before the town clerk of the town in which such constable shall be elected, who shall administer and certify the same without fee or reward.⁶ The oath may also be administered and certified by any justice of the peace, or any county judge, or justice of the supreme court. Such person so elected, within eight days after taking such oath, shall cause the certificate thereof to be filed in the office of the town clerk.⁷ And if any person chosen or appointed to the office of constable, shall not take and subscribe such oath, and cause the certificate thereof to be filed as above required, such neglect shall be deemed a refusal to serve.⁸ And if any such constable shall enter upon the duties of his office before he shall have taken such oath, he shall forfeit to the town the sum of fifty dollars.⁹

§ 1012. The person so chosen or appointed constable, within the time prescribed for taking the oath of office, shall also execute in the presence of the supervisor or town clerk of the town, with one or more sureties, to be approved of by such supervisor or town clerk, ar

¹ Laws 1846, Ch. 341, § 2.

² 1 R. S. 823, § 20.

³ 1 R. S. 823, § 21.

⁴ 1 R. S. 828, § 57.

⁵ 1 R. S. 826, § 43.

⁶ 1 R. S. 825, § 36.

⁷ 1 R. S. 825, § 37.

⁸ 1 R. S. 825, § 38.

⁹ 1 R. S. 827, § 54.

instrument in writing, by which such constable and his sureties, shall jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may be liable to pay, on account of any execution which shall be delivered to him for collection.¹ The bond or instrument should be general, and should not be given to the people of the state, or of the county, though it will not vitiate it if it be given to the former.²

§ 1013. The supervisor or town clerk shall indorse on such instrument, his approbation of the sureties therein named, and shall then cause the same to be filed in the office of the town clerk, and a copy of such instrument, certified by the town clerk, shall be presumptive evidence in all courts, of the execution thereof by such constable and his sureties.³ But neither the constable nor his sureties can object that the instrument was not filed within the time; nor that the supervisor or town clerk's approval was not indorsed, nor that the bond was not under seal.⁴

§ 1014. If any person chosen or appointed to the office of constable, shall not give such security and take such oath, as is above required, within the time limited for that purpose, such neglect shall be deemed a refusal to serve.⁵

§ 1015. A constable may resign his office to any three justices of the peace of the town, who may, for sufficient cause shown to them, accept the resignation, and whenever they shall accept any such resignation, they shall forthwith give notice thereof to the town clerk of the town.⁶

§ 1016. The office of constable shall become vacant on the happening of either of the following events before the expiration of the term of such office :

1. The death of the incumbent ;
2. His resignation ;
3. His removal from office ;
4. His ceasing to be an inhabitant of the town for which he shall have been chosen, or appointed ;
5. His conviction of an infamous crime, or of any offence involving a violation of his oath of office ;
6. His refusal or neglect to take the oath of office within the time required by law, or to give or renew any bond within the time prescribed by law. But if he enters upon the duties of the office without having first taken such oath, he will be deemed an officer de facto,

¹ R. S. 826, § 43.

² 2 Wend. 281, *The People v. Holmes*;
20 John. 74, *Warner v. Racy*.

³ 1 R. S. 826, § 44.

⁴ 12 Wend. 306, *Skellinger v. Yendes* ;
14 John 401, *Raymond v. Lent*.

⁵ 1 R. S. 826, § 46.

⁶ 1 R. S. 828, § 58.

so far as the public are concerned, and such neglect cannot be taken advantage of collaterally; but in such case he shall forfeit to his town the sum of fifty dollars.¹

7. The decision of a competent tribunal declaring void his election or appointment. But until his election is so declared void, his acts are legal;²

8. His acceptance of another office, the duties of which are incompatible therewith.³

§ 1017. If any constable shall have collected any money on execution, and a recovery therefor shall have been had against his sureties, upon a complaint thereof being made to any three justices of the same town, they shall summon such constable to appear before them, to show cause why he should not be removed from office.⁴

§ 1018. If such complaint be established to the satisfaction of such justices, or of any two of them, after hearing of the parties, or after the refusal or neglect of the constable to appear upon such summons, they shall, by a instrument under their hands, remove such constable from his office, assigning therein the reason of such removal, and shall file the same in the office of the town clerk, who shall forthwith cause a certified copy thereof to be served on such constable.⁵ Upon the service of a copy of such instrument, certified by the town clerk, on the constable named therein, such constable shall cease to have any power or authority as such, and his office shall be deemed vacant.⁶ In the city of Albany, the special constables may in like manner be removed by the justices of the justices' court, of said city, and they shall file the instrument of removal with the clerk of Albany county.⁷

§ 1019. The powers and duties of constables as peace officers, within the county, and on the arrest, detention, and committing one charged with crime, are the same as in the case of sheriffs;⁸ and upon a proper warrant, they can, like sheriffs, arrest in any part of the state. In many special proceedings they have concurrent jurisdiction with the sheriff; while they alone can execute process from justices' courts, in civil cases, except in the cases where a justice may depute another person to perform such service. Like sheriffs, they can serve civil process in any part of the county,⁹ and at the same times, and in the same manner. They can also, like sheriffs, pass through other counties

¹ 1 Denio 574, the People v. Hopson; 4 Denio 168, Greenleaf v. Low; 2 Barb. 320, Weeks v. Ellis; 1 R. S. 827, § 54.

² 1 Hill 674, The People ex rel. Woodward v. Covert.

³ 3 Hill 243, Van Orsdall v. Hazard; 2 Hill 93, The People ex rel. Whiting v. Carrique; 8 Cow. 212, Paddock v. Cameron.

⁴ 3 R. S. 460, § 193.

⁵ 3 R. S. 460, § 194.

⁶ 3 R. S. 460, § 195.

⁷ 3 R. S. 403, § 38.

⁸ Ante § 48, &c.; 9 Met. (Mass.) 262, Com. v. Hasting.

⁹ 1 John. 502, Mills v. Kennedy; 6 Cow. 642, The People ex rel. Ingersoll v. Garey.

in conveying one arrested on civil or criminal process, from the place of arrest to the place where he is to be brought. The same rules of law which govern sheriffs in the execution of process from the higher courts, govern constables in the execution of justices' process, except where some statute intervenes;¹ and they have the same power as sheriffs in calling out the power of the county to aid in the execution of process; and when property levied upon is claimed by another, they may, like the sheriff, call a jury to try such claim. The powers and duties of constables in all such cases, will be found pointed out in the preceding part concerning the duties of sheriffs under the appropriate heads. Where the powers or duties of constables differ in any respect from those of sheriffs, the distinction will be pointed out in the succeeding pages.

§ 1020. Every constable to whom process shall be directed and delivered in a civil action before a justice, shall execute the same in person, and shall not act by deputy in any case.² But every justice who shall issue any process in such case, excepting a venire, whenever he shall judge it expedient, on the request of a party, may by written authority indorsed on such process, empower any proper person, being of lawful age and not a party in interest in the suit, to execute the same.³ The person so empowered, shall thereupon possess all the authority of a constable, in relation to the execution of such process, and shall be subject to the same obligations, but shall not receive any fee or reward for his services therein.⁴

§ 1021. A constable who has served either the original, or the jury process in the cause, shall not appear as attorney and advocate for either party at the trial; but he may act as attorney in any other stage or proceeding in the cause.⁵ He may appear for the plaintiff on the return of the summons, and put in a declaration; and at the request of the party he may employ counsel;⁶ but he cannot appear as attorney on the trial and prove the demand declared on.⁷ And where he arrested one on a warrant, who authorized him to appear and confess judgment for the amount, such judgment was held to be utterly void.⁸

§ 1022. No constable shall ask or receive any money or valuable thing from a defendant or any other person, as a consideration, reward, or inducement for omitting to arrest any defendant, or to carry him before any justice; or for delaying to take any party to prison, or for

¹ 2 Cow 431, *Pixley v. Butts*.

² 3 R. S. 460, § 198.

³ 3 R. S. 460, § 196.

⁴ 3 R. S. 460, § 197.

⁵ 3 R. S. 433, § 42.

⁶ 9 John. 332, *Phinney v. Earl*; 3 Denio 84 *Miles v. Pulver*.

⁷ 11 Wend. 73, *Ford v. Smith*.

⁸ 9 Cow. 61, *Colvin v. Luther*.

postponing the sale of any property, under any execution, or for omitting or delaying the execution of any duty pertaining to his office.¹ And no constable shall, directly or indirectly, buy or be interested in buying any bond, note, or other demand or cause of action for the purpose of commencing any suit thereon before a justice; nor either before or after suit brought, lend or advance, or agree to lend or advance, or procure to be lent or advanced any money or other valuable thing to any person in consideration of, or as a reward for or inducement to, the placing or having placed in his hands, any debt, demand or cause of action whatever, for prosecution or collection.² Any constable offending against any of these provisions, shall be deemed guilty of a misdemeanor, and on conviction shall be subject to fine and imprisonment, or both, in the discretion of the court, and every such conviction shall operate as a forfeiture of the office of the constable so convicted.³

§ 1023. Any person who shall knowingly and maliciously cause or procure any process issued from a justice's court, in a civil suit, to be served on Saturday, upon any person whose religious faith and practice is to keep such day as the Sabbath, or who shall serve any such process which shall be made returnable on said day, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be subject to a fine, not exceeding one hundred dollars, or imprisonment, not exceeding thirty days, or both. And any person who shall procure any such suit pending in such court, against any person of such religious faith and practice, to be adjourned to be tried on Saturday, shall be deemed guilty of a misdemeanor, and be subject to like punishment.⁴

§ 1024. All process issued by a justice of the peace, shall be signed by him, and may be with seal or without seal.⁵ And every summons, warrant, attachment, and execution issued by a justice of the peace, shall be entirely filled up, and shall have no blank, either in the date or otherwise, at the time of its delivery to an officer to be executed, otherwise it shall be void.⁶ And general directions by a justice to a constable to alter the dates of executions, instead of renewing them, or to fill up or alter process is void.⁷

§ 1025. As has been seen, no officer can execute process unless it is directed to him for service, or to the class of officers to which he belongs. If it is not directed to any officer, no one can execute it;

¹ 3 R. S. 454, § 160.

² 3 R. S. 454, § 161.

³ 3 R. S. 455, § 162.

⁴ 2 R. S. 936, §§ 70, 71.

⁵ 3 R. S. 454, § 153.

⁶ 3 R. S. 454, § 159.

⁷ 10 John. 405, *Pierce v. Hubbard*

and if it be directed to an officer by name no one but such officer can serve it. If it be directed to an officer by his title of office merely, any such officer to whom it is directed, may execute it. Justices process in criminal cases is usually directed to the sheriff or any constable of his county, in which case the sheriff or any of his deputies may execute it, and in civil cases it is usually directed to any constable of the county, which will authorize any constable in the county to execute it. If however, it is directed to any constable of a city, town or village, no constable can execute it though he be a constable of the county, if he does not also reside in the city, town or village.¹

§ 1026. Constables must execute all process directed and delivered to them for execution, by any court, officer, or body having the right to issue the same, either in a criminal or civil proceeding, including the service of subpœnas issued by board of supervisors,² and also make return of their doings thereunder, and a refusal to execute process subjects the officer to indictment as well as to an action at the suit of the party injured, for any damages he might have sustained in consequence of such neglect or refusal. If the process is void, that will excuse the constable for not executing it, but not if it is merely irregular. In the cases where he may demand his fees before service, a refusal by the party seeking the execution of the process to pay them, will warrant a refusal to execute the process. But a refusal to execute process in any other case before his fees were paid, would be an indictable offence. And so he might refuse to execute process if he was unwell; or if he was at the time engaged in other official duty.³

§ 1027. A constable may serve a summons in his own favor.⁴ But he cannot serve a warrant, attachment or execution in a cause wherein he is a party or has an interest in. The constable who has commenced the execution of process must finish it, as it is an entire thing.

§ 1028. The same rules are applicable to process in the hands of constables, as in the case of sheriffs, in respect to the execution of process, which is void or voidable. If the process does not require the arrest of a party, or the seizure of his goods, it will be immaterial to the constable whether such process is regular on its face or voidable, or even void. He may execute all such process with impunity; and as a general thing it will be his duty to do so. But if it be an

¹ Ante §§ 57, 150; 6 Barb. 654, Russell v. Hubbard; 5 Denio 532, Merritt v. Read; 51 Barb. 546, Abbott v. Booth.

² 1 R. S. 853, § 21.

³ Ante, §§ 11, 28, 282, &c., 670, &c., 977;

3 R. S. 739, § 98; Id. 979, § 53; Id. 931, § 6.

⁴ 4 John. 486, Bennett v. Fuller; 2 Cow 436, Tuttle v. Hunt; 3 Wend. 202, Putnam v. Man.

⁵ 1 Cow. Tr. 236.

attachment or execution against the property of one; or if it be a warrant or execution against his body, the constable should ascertain before he proceeds to execute it, that it is not void upon its face; otherwise he may render himself liable as a trespasser. Thus, where process in a civil action is delivered to him for execution, he should see that it is directed to him by name, or to the class of officers to which he belongs, as to any constable of his county; and that it contains no blank to be filled up; that the justice issuing it resides in his county; and that he has jurisdiction of the subject matter of the action, and of the person of the defendant, as appears upon the face of the process; or at least that the subject matter is within the jurisdiction of the justice, and that nothing appears on the face of the process to show that he has not also jurisdiction of the person of the defendant.¹

CHAPTER II.

SERVICE OF THE SUMMONS. ^a

§ 1029. The usual mode of commencing actions in justices' courts, is by the service of a summons, of which there are two kinds. The first is known as the long summons, and must be made returnable not less than six nor more than twelve days from the date of the same.² The other is known as the short summons, and must be made returnable not less than two, nor more than four days from the date thereof;³ and a summons made returnable five days, or three days from its date, is neither a long nor a short summons, and is void.⁴ Every summons whether it be a long or short summons, shall be directed to any constable of the county, where the justice resides, by name, or generally, to any constable of the county, commanding him to summon the defendant to appear before the justice who issued the same, at the time and place named therein.⁵

§ 1030. Such summons must be served by the constable to whom the same is directed and delivered, if it be the long summons, at least

¹ Ante, § 280, &c.

² 3 R. S. 428, § 12.

³ 3 R. S. 462, § 214.

^a Ala.—R. C. § 3205.

Cal.—Dig. 1860, p. 233.

Conn.—Rev. 1866, p. 3.

Fa.—Dig. 1847, p. 468.

Ga.—Code, p. 797.

Ia.—Rev. 1860, p. 670.

Ind.—2 R. S. p. 454.

Kan.—Gen. St. p. 778.

Md.—1 Code 126.

⁴ 15 Barb. 650, *Sherwood v. The Saratoga & Washington R. R. Co.*

⁵ 3 R. S. 428, § 12.

Mass.—1860, p. 604.

Mich.—St. 1857, p. 1046.

Mo.—Gen. St. 1865, p. 699.

Neb.—R. S. 552.

Nev.—St. 1869, p. 273.

N. J.—Dig. 1855, p. 391.

O.—1 R. S. 773.

On.—Gen. L. 586.

W. Va.—St. 1863, p. 192.

Wis.—R. S. 668.

six days, and if it be the short summons, at least two days, before the time of appearance mentioned therein.¹ In computing such time, the day of service is to be excluded, and the day of appearance included. The law does not regard the fractions of a day; and service in the afternoon of the last day on which the service can be made will be good, though the time of appearance is in the morning.²

§ 1031. The manner of serving the summons upon the defendant, where it is a corporation, is the same as in the case of an action commenced by summons in a court of record³. A copy thereof must be delivered to the president or other head of the corporation, secretary, cashier, treasurer, or director, or managing agent thereof.⁴ But such managing agent must be one whose agency extends to all the transactions of the corporation, and not merely to a particular branch.⁵ Where the corporation to be served, is a foreign insurance company or an express company, the service is to be made on the person designated by said companies respectively for the service of papers under the acts of 1855 (chap. 279), and of 1864 (chap. 412.) Or in default of such designation if such service cannot be made as in other cases of corporations, then it may be made upon any person found within this state acting as the agent of such insurance company or doing business for it;⁶ or, in the case of an express company, upon any local or general agent, agent to receive freight or parcels, route agent or messenger residing in the town with the justice of the peace.⁷ If the corporation to be served is a railroad in this state, service shall be made on the person designated by it under and pursuant to chapter 282 of the laws of 1854, on whom process to be issued by a justice of the peace may be served. In case no such designation shall be made by the corporation to be served, and where no officer of the company shall reside in the county on whom process can be served according to the existing provisions of law, process may be served on any local superintendent of repairs, freight agent, agent to sell tickets or station keeper of such corporation residing in such county, which service shall be as effectual as if made on the president or any director of such corporation.⁸ In all other cases the summons is served by reading the same to the defendant and in his hearing,⁹ unless he expressly waive it or evade the hearing, by leaving the constable or otherwise, after he learns the purpose of the officer.¹⁰ If required by

³ R. S. 428, § 13.

² 1 Cow. Tr. 551; 10 Wend. 422, *Columbia Turnpike Road v. Haywood*.

³ Code, § 64, sub. 15.

⁴ 49 Barb. 149, *Curtis v. The Avon & Mt. M. R. R. Co.*

⁵ 5 How. 183, *Brewster v. The Michigan Central R. R. Co*

⁶ 3 R. S. 874, § 1.

⁷ Laws 1864, Ch. 412.

⁸ 2 R. S. 697, §§ 79, 80.

⁹ 3 R. S. 428, § 13.

¹⁰ 1 Cow. Tr. 552.

the defendant, the constable must also leave with him a copy. If the defendant cannot be found, the summons must be served by leaving a copy thereof at his last place of abode, in the presence of some one of the family, of suitable age and discretion, who shall be informed of its contents.¹ The constable is to find the defendant if he can do so, but he is not bound to look for him at any other than his usual place of residence, or last place of abode. But where he may have been on business, visiting, or may have stopped in his travels, or the like, is not such place.² It is not to be understood that if the defendant is known to be in any other place in the county, than at his place of residence, the constable is not required to seek him and make the service. It means that he is not required to go all over the county to make inquiries; and it will be sufficient if he makes them at the defendant's residence. But if he ascertains there or elsewhere that the defendant is to be found in the county, it is his business to go where he is and make the service. When the service is made by leaving a copy, in the absence of the defendant, the constable should be sure that the place where the same is left is the defendant's residence, or last place of abode, and that the person in whose presence he leaves the copy, is a member of the family, and of suitable age (at least fourteen years) and discretion, and the information of its contents should convey a clear idea of the name of the magistrate, the parties to the suit, and the time and place of appearance.³

§ 1032. The rights and liabilities of the constable in entering a dwelling to serve process, are the same as those of the sheriff in making similar service. And if the outer door of the defendant's house be shut, the officer will be a trespasser if he enters without leave, to serve the summons, or any other civil process.⁴ If the defendant is within his dwelling, and admission is refused, the constable should make service of the summons by reading the same aloud at the door.⁵

§ 1033. The constable serving the summons, shall return thereupon, in writing, the time and the manner in which he executed the same, and sign his name thereto.⁶ But a return endorsed on the summons in the handwriting of the justice, made by the direction of the constable, but not signed by him, has been held a sufficient return within the statute.⁷ The return must state the time,⁸ and whether such

¹ 3 R. S. 428, § 13.

² 1 Cow. Tr. 551.

³ Cow. Tr. 552.

⁴ Ante §§ 312, &c.

⁵ 1 Cow. Tr. 555.

⁶ 3 R. S. 428, § 14.

⁷ 20 N. Y. 298, *Reno v. Pinder*.

⁸ 1 Cow. Tr. 552; 2 Cow. 418, *Legg v. Stillman*; 17 Wend. 517, *Stewart v. Smith*; 2 Hill 517, *Bromley v. Smith*.

service was personally, or by copy, and the return must be on the summons.¹ But the return need not show that the constable read the summons to the defendant ; or that he read and delivered a copy to the defendant, or state with whom he left the copy.² If the defendant is found, it is sufficient to return that the summons was personally served upon him ; or if not found, that the same was served by copy, he not being found.³ It has been held that a return by a constable to a summons, properly directed to any constable of the county, that it was personally served, was a sufficient return that the service was made by a constable of the county, and that the service was made within the county.⁴ But it will be better if the return state fully how the service was made. If there are several defendants, and the mode of service was different upon each or any of them, it must appear how it was made upon each, and if any of them cannot be found, or their last place of abode cannot be ascertained, the return should so state.⁵ Though if it do not, a proper return as to those actually served, will give the justice jurisdiction.⁶ But the better course is for the constable to return the fact. If the service is upon a corporation, the return must not only state the time of the service, and the name of the person served, and that the same was served by delivering a copy of the summons to the person served, but it must also show what office he holds in the corporation. If the corporation be a foreign insurance company, an express company or a railroad company, and no officer of such company can be found in the county on whom to make service, and the service is made upon the person designated by such company on whom papers may be served,⁷ the return should not only state the name of the person served, but also that he was the person designated by such company for that purpose. In case the company to be served has made no such designation, and the service is made upon any of the other persons upon whom service in such case is authorized to be made, the return should show, in the case of a foreign insurance company, that the person served was acting within this state as the agent of such insurance company, or doing business for it, as the case may be. And in the case of an express company, that the person served was a local or general agent of the company, agent to receive freight or parcels, route agent or messenger, residing in the town with the justice of the peace who issued the process. And in the case of a railroad, that the person

¹ 3 R. S. 423. § 14.

² 1 Cow. Tr. 553.

³ 1 Cow. Tr. 553.

⁴ 2 Cow. 418, *Legg v. Stillman* ; 1 Sandf.

92 ; 27 How. 10, *Potter v. Whittaker*.

⁵ 1 Cow. Tr. 554.

⁶ 13 Barb. 246, *Fogg v. Child*.

⁷ Ante, § 1031.

served was a local superintendent of repairs, freight agent, agent to sell tickets or station keeper of such corporation, residing in such county. The return of the constable that the person served is an officer of the company, or that there is no officer of the company residing in the county, or that no person has been designated by the company on whom service can be made, and that the person served is one of the persons authorized to be served in default of such designation, is sufficient evidence of the facts to give the justice jurisdiction.¹ If the return is false the defendant may show it, and if damages are sustained by it, the constable will be liable in an action therefor.²

CHAPTER III.

SERVICE OF ATTACHMENTS. *a*

§ 1034. There are also two kinds of attachments, by which actions are commenced in justices' courts. The one is known as the long attachment, and the other as the short attachment. The former is like the long summons, made returnable not less than six, nor more than twelve days from the date thereof;³ and the latter, like the short summons, not less than two, nor more than four days from the date thereof.⁴ Every such attachment shall state the amount of the debt sworn to by the applicant, and shall command any constable of the county in which such justice resides, to attach so much of the goods and chattels of the debtor, as will be sufficient to satisfy such debt; and safely to keep the same, in order to satisfy any judgment that may be recovered on such attachment; and to make return of his proceedings thereon, to the justice who issued the same at the time therein specified.⁵

§ 1035. The constable to whom such attachment shall be directed and delivered, shall, if it be the long attachment, execute the same, at least six days, and if it be the short attachment, at least two days⁶ before the return day therein mentioned.⁷ The mode of computing the time of service, is the same as in the case of the service of a sum-

¹ 18 Barb. 574, *N. Y. & Erie R. R. Co. v. Purdy*; 24 Barb. 414, *Wheeler v. N. Y. & Harlaem R. R. Co.*
² 3 Wend. 202, *Putnam v. Man*; 4 John. 486, *Bennett v. Fuller*; 2 Cow. 436, *Tuttle v. Hunt*.

³ 3 R. S. 431, § 28.

⁴ 3 R. S. 462, § 215.

⁵ 3 R. S. 431, § 28.

⁶ 3 R. S. 431, § 29.

⁷ 3 R. S. 462, § 215.

^a Ala.—R. C. § 2953.
 Ark.—Dig. St. 1853, pp. 159, 650.
 Cal.—Dig. 1860, 235.
 Conn.—Rev. 1866, p. 3.
 Kan.—Gen. St. 1863, p. 781.
 Mass.—St. 1860, p. 604

Mich.—St. 1857, pp. 1046, 1095.

Neb.—R. S. 556.

O.—1 R. S. 779.

Tenn.—Code, 751.

W. Va.—St. 1863, p. 196.

Wis.—R. S. 681.

mons; that is, the day of service is excluded and the day of appearance is included.¹ The service of the attachment is made by the constable attaching and taking into his custody and safely keeping such part of the goods and chattels of the defendant which he may find in his county, as shall not be exempt from levy and sale on execution, and as shall be sufficient in his judgment to satisfy the plaintiff's demand and costs. The constable is also required immediately on seizing the goods to make an inventory of the property seized, and if the defendant can be found in the county, he shall serve upon him personally, a copy of the attachment and inventory² certified by him. But if the defendant cannot be found in the county, then he shall leave such copies so certified by him at the last place of residence of the defendant in the county; but if the defendant have no place of residence in the county where the goods and chattels were attached, such copy and inventory shall be left with the person in whose possession the said goods and chattels shall be found.³ If there be two or more defendants the service must be made on all in the manner pointed out.⁴

§ 1036. The powers, duties and liabilities of the constable in executing an attachment, are the same as on making a levy under an execution against property. It can only be executed on the days when a levy may be made under an execution from a justice's court, and on the like personal property as on a levy, and no other. Property exempt from levy and sale on execution cannot be attached, unless the claim is for the purchase price of such goods, as in the case of executions. Nor can choses in actions be attached, as they may be, in the case of attachments issued to the sheriff from courts of record. The officer has the same power to call upon others to aid him in seizing, holding or retaking the property as on execution; and he is restricted in the same way against entering the defendant's dwelling to make the seizure as when making a levy under an execution. Though the property of another cannot be attached, yet if the defendant is a part owner thereof, or has an interest or lien thereon, with the immediate right of possession, they are liable to the attachment. The seizure must be made in the county in which the attachment issued and is returnable, if any property can be found therein subject to the attachment, and not elsewhere. But if after seizing the property, the same is removed by the defendant, the constable may follow it to retake it in any part of the state. The attaching the

¹ Ante, § 1030.

² 3 R. S. 463, § 218.

³ 3 R. S. 431, § 29.

⁴ 3 Denio 317, Cook v. McDoel

property gives the constable a lien upon it so as to authorize his retaking it, or to maintain an action against any one who removes it or unlawfully interferes with his possession.

§ 1037. On attaching the goods of the defendant, unless a bond is given to the constable as hereinafter mentioned, he should, as in the case of a levy under an execution, take the property into his possession, or take a receipt therefor of some person or persons as in case of a levy, for the return of the property; though he may if he chuses, leave the property in the possession of the defendant, or of the party with whom it was found. But if he leaves it with the debtor or party with whom it was found, whether he takes a receipt for it or not, nothing but the act of God or of the public enemies will excuse him if the property is lost or destroyed. If, however, he takes it into his actual possession and uses due care, and it is lost or destroyed without his fault or neglect, he will not be liable.¹

§ 1038. On the seizure of the goods, as in the case of a levy on execution, they are in the custody of the law, and are not liable to a subsequent seizure by another constable, or to a levy by the sheriff. And it makes no difference that a bond is given under the statute.² And such lien continues until judgment, and a reasonable time thereafter to make a levy upon the property by virtue of the execution.³ It has been held however that if the execution is not levied within a reasonable time after issuing, and the goods in the meantime are removed by the debtor beyond the jurisdiction of the justice who issued the attachment, the lien of the attachment is gone, notwithstanding the issuing an execution under the attachment. The constable holding it cannot maintain an action for such property.⁴

§ 1039. No goods attached by any constable shall be removed by him, if a bond be given and delivered to such constable, by any person, with sufficient surety, to be approved by such constable, in a penalty of double the sum stated in the attachment, to have been sworn to by the plaintiff; conditioned that such goods and chattels shall be produced to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff upon such attachment within six months after the date of such bond.⁵ The giving such bond does not release the lien of the attachment however, but the same continues, notwithstanding, until after the judgment is obtained and a reasonable time thereafter in which to make a levy.⁶

¹ 1 Cow. Tr. 567; Ante, § 443.

² 10 John. 120, Van Loan v. Kline; 20 Wend. 238, Sterling v. Welcome; Ante, § 449.

³ 20 Wend. 238, Sterling v. Welcome.

⁴ 20 Wend. 238, Sterling v. Welcome.

⁵ 3 R. S. 432, § 32.

⁶ 20 Wend. 238, Sterling v. Welcome; 10 John. 120, Van Loan v. Kline.

§ 1040. If any person shall claim any goods or chattels attached by the constable, he may after such seizure, and at any time before execution shall have been issued upon the judgment obtained on such attachment, execute a bond to the plaintiff, by himself and with sureties to be approved by the constable, or by the justice who issued the attachment, in a penalty double the value of the property attached, conditioned that in a suit to be brought on such bond, within three months from the date, such claimant will establish that he was the owner of the goods seized at the time of such seizure, and in case of his failure to do so, that he will pay the value of the goods claimed with interest.¹ But a sheriff who holds the goods under a levy is not the owner and cannot execute such bond.²

§ 1041. The first mentioned bond is to be given to the constable, and may be executed by any person, with one or more sureties as the constable may determine. The second mentioned bond is to the plaintiff, and must be executed by the claimant with sureties. In the first bond one surety will be sufficient, if he is able to respond; while in the second, two at least, will be necessary. The first bond must be in the penalty of double the sum sworn to by the plaintiff; and the penalty of the claimant's bond, be double the value of the property attached;³ which value must be ascertained by the constable by the best judgment of competent persons.⁴ A constable has a discretion in respect to the security, and if he act in good faith, will be protected, though such surety should eventually not prove good. When the surety is a stranger to the constable, or if he is unacquainted with his circumstances, or doubts his sufficiency, he should administer an oath to the person so offered.⁵ And if he does this, and such person proves his sufficiency, the officer cannot be held liable, for he has done all the law required of him.⁶ If the second bond is approved of by the justice, as it may be, the constable will incur no liability, though it should not be good. The approval of the bond should be indorsed thereon, and be signed by the officer making the same, though the acceptance of such bond by the constable without such approval would perhaps be sufficient. If however, the second bond is approved by the justice, the constable should require that such approval be indorsed thereon and signed by the justice in his official capacity, or he may be held responsible for the taking the same. Upon either of the bonds aforesaid being executed and delivered to the constable, he shall deliver up the property seized by him, to the obligor in such bond.⁷

¹ 3 R. S. 431, § 31.

² 25 Barb. 631, *Pierce v. Kingsmill*.

³ 1 Cow. Tr. 569.

⁴ 1 Cow. Tr. 571.

⁵ 1 Cow. Tr. 569; 3 R. S. 866, § 9.

⁶ 1 Cow. Tr. 569.

⁷ 2 R. S. 432, § 32.

§ 1042. The constable serving the attachment shall make return thereof, at the day therein named for that purpose, with all his proceedings thereon, in writing, subscribed by him, with a copy of the inventory of the goods attached, certified by him, and with any bond which may have been executed and delivered to him.¹ In such return he shall also state specifically whether the copy of the attachment and inventory were or were not personally served upon the defendant.² And he should state where the service was made, or at least that it was within the county, the time when the levy was made and when the copy was served.³ It has been held a good return where it showed that the defendant could not be found in the county, and had no place of residence therein, and that the service was made upon the person with whom the property was found, though it did not show whether the service was made on the defendant or not. And a return that an attachment was personally served, has been held good, although it did not show that the copies were certified by the constable.⁴ A return of the constable that by virtue of an attachment against A. B. he levied on certain property, will be intended to be a return that he levied upon the property of the defendant.⁵ If the attachment be returned regularly served, the justice has jurisdiction, though such return be false, and the judgment will not be annulled on that ground.⁶ A return stating that a copy of the attachment was left with the defendant's wife, he not being found in the county, without showing that any property had been seized or any inventory left with her, has been held not a sufficient return.⁷ But a return that the constable had seized certain property by virtue of the attachment not stating when or where seized, and adding, the defendant not being found in the county, I served a copy of said attachment on A. B. the person in whose possession I found the property so attached with an inventory of said property attached endorsed thereon, was held good.⁸

CHAPTER IV.

SERVICE OF WARRANTS. *a*

§ 1043. A warrant for the arrest of a defendant in civil action in a justice's court, shall be directed to any constable of the county

¹ 2 R. S. 432, § 33.

² 2 R. S. 463, § 218.

³ 21 How. 429, *Egbert v. Watson*.

⁴ 11 Barb. 520, *Van Kirk v. Wilds*.

^a Ark.—Dig. 1858, p. 650.

Cal.—Dig. 1860, p. 234.

Ia. Rev. 1860, p. 846.

Ind.—2 R. S. p. 454.

Kan.—Gen. St. 1868, p. 778.

⁵ 20 Wend. 145, *Johnson v. Moss*.

⁶ 7 Wend. 398, *Case v. Redfield*.

⁷ 23 How. 59, *Williams v. Barnaman*.

⁸ 31 N. Y. 595, *Bascom v. Smith*.

Mich.—St. 1857, p. 1048.

Neb.—R. S. 554.

Nev.—St. 1869, p. 274.

N. J.—Dig. 1855, p. 392.

O.—1 R. S. 774.

where the justice issuing the same resides, and shall command such constable to take the defendant, and bring him forthwith, before such justice, to answer to the plaintiff in a plea in the same warrant to be mentioned; and shall further require the constable, after he shall have arrested the defendant, to notify the plaintiff of such arrest.¹

§ 1044. The persons who are exempt from arrest, in civil actions, have already been pointed out;² and the duties of constables in the execution of the warrant of arrest, in such cases, are the same as those of sheriffs under similar circumstances. Though it is provided that where the name of any defendant shall not be known to the plaintiff, he may be described in the summons or warrant by a fictitious name,³ yet great caution must be used by the officer in arresting the proper party. He must arrest the person intended, and no other. Where the officer does not know the defendant, he should have some one who is familiar with him, point him out before he assumes to make the arrest.

§ 1045. The powers, duties and liabilities of constables, in making arrests under the warrant, are the same as those of sheriffs, under civil process. The time, places and manner of arrest are the same. He may enter the dwelling house of a defendant for that purpose in the same manner as sheriffs may do; and he has also the same right to call upon others to aid him in making the arrest, or in seizing or retaking the prisoner; and resisters are liable to the same penalties for opposing the execution of process in the hands of constables as in the hands of sheriffs; and they can also retake a prisoner after an escape in the same manner as sheriffs.

§ 1046. On serving a warrant, the officer must arrest the defendant and take him forthwith before the justice issuing the same. The constable cannot, on making the arrest, take security from the defendant for his appearance, but he must actually bring him before the court;⁴ and if he do not, though the return be regular upon its face, that the defendant is in custody, and it be made with the defendant's assent, a judgment rendered thereon will be void.⁵ But the constable may allow the prisoner to go at large, if he have him when required. Yet if in such case, he is in the mean time arrested by another officer on a criminal charge, so that the constable cannot have him on the

¹ 3 R. S. 429, § 18.

² Ante, § 290, &c.

³ 3 R. S. 461, § 207.

⁴ 5 Wend. 61, *Millard v. Canfield*.

⁵ 1 Cow. Tr. 556.

return of the warrant, it will be deemed a voluntary escape for which he will be liable to the plaintiff.¹

§ 1047. If it be necessary, after the constable has arrested the defendant, he may confine him in his house or other place of security, or place him in the jail, with the sheriff's leave, for safe keeping, or while he looks for assistance, or during the night, if the arrest is so late that he cannot get to the justice's office before sundown; but in general he is to obey the warrant and take the prisoner forthwith on his arrest, by the nearest and most direct route and in the most convenient time to the justice who issued the warrant. And if such justice be, on the return of the warrant, absent or unable to hear or try the cause, or if it shall be made to appear to such justice, by the affidavit of the defendant that the justice is a material witness in the cause, the constable shall take the defendant before the next justice of the city or town, who shall take cognizance of the cause and proceed thereon, as if the warrant had been issued by him.²

§ 1048. When the constable has arrested the defendant, he shall, according to the direction of the warrant, notify the plaintiff of the arrest;³ which notification may be by parol, or by written notice, or by a messenger or otherwise.⁴

§ 1049. Every constable serving a warrant, shall return thereupon, in writing, the manner in which he executed the same, and the fact whether he has or has not notified the plaintiff.⁵ When, for any reason, the justice who issued the warrant shall be unable to hear or try the cause, and the defendant shall be taken before another justice, the constable's return to such process, shall show the absence or inability of the justice to hear or try such cause.

§ 1050. When the defendant shall be brought before a justice on a warrant, he shall be detained in the custody of the constable until the justice shall direct his release. But in no case shall the defendant be detained longer than twelve hours from the time he shall be brought before the justice, unless within that time, the trial of the cause shall be commenced; or unless it shall be delayed at the instance of the defendant,⁶ in which case he shall remain in the custody of the constable, unless he give a bond⁷ to the plaintiff required by the statute, and approved by the justice.⁸ If the cause be adjourned on the consent of both parties, or upon the application of the plaintiff, the

6 John. 62, *Olmstead v. Raymond*; 10

Wend. 514, *Arnold v. Steeves*.

1 Cow. Tr. 565; 3 R. S. 429, § 19.

³ Ante, § 1043.

⁴ 1 Cow. Tr. 557.

⁵ 3 R. S. 430, § 20.

⁶ 3 R. S. 430, § 23; 10 Wend. 514, *Arnold v. Steeves*.

⁷ 3 R. S. 437, § 61.

⁸ 3 R. S. 438, § 66.

defendant shall be discharged from custody.¹ The time necessary to find a justice to try the defendant, is not to be considered as part of the twelve hours. If however, he shall be detained an unreasonable time before he is carried to the justice, or shall be kept more than twelve hours after being brought to the justice, and before the trial is commenced, the constable and all parties will be deemed trespassers.²

§ 1051. In the case of an action for a penalty for taking any rails, boards, planks, staves, or fire-wood from the banks or vicinity of a canal, he warrant may direct the detention of any canal boat or float and the furniture and horses belonging thereto, until the suit shall be determined, or until adequate security shall be given for the payment of any judgment that may be recovered. On receiving such warrant, which should have indorsed on it by the justice issuing it, a reference to the statute under which the same is issued, as in the case of all process issued in actions for penalties, it will be the duty of the constable not only to arrest the defendant, but also seize³ and take into his possession such boat and the horses and furniture; and make return of the execution of the warrant and give notice to the other party as in the ordinary cases of arrest on warrant issued by justices of the peace. When the constable has seized the boat, horses and furniture he shall hold the same until directed to release the same by the justice issuing the warrant, which he may do on receiving adequate security for the payment of any judgment that may be recovered, or if the defendant prevails in the suit, or any judgment recovered thereon is paid. But if no such order is given to the constable, he shall retain the property until an execution is issued on the judgment, when the same may be sold to satisfy such judgment in like manner as if the judgment had been obtained against the owner thereof.⁴

CHAPTER V.

PROCEEDINGS FOR THE RECOVERY OF PERSONAL PROPERTY. a

§ 1052. The proceedings for the recovery of personal property in justices' courts are very similar to the proceedings on the claim and

¹ 3 R. S. 437, § 62.

² 1 Cow. Tr. 558; 10 Wend. 514, Arnold v. Steeves.

³ Ante, § 667.

⁴ 1 R. S. 628, §§ 290-294.

^a Ill.—Laws 1859, p. 152.

Ind.—2 R. S. 1852, p. 468.

Kan.—Gen. St. 1868, p. 788.

Mich.—St. 1857 to 1053.

Minn.—Rev. 1866, p. 432.

Mo.—Gen. St. 1865, p. 702.

Neb.—R. S. 577.

O.—1 R. S. 794.

Tenn.—Code, pp. 727, 751.

Wis.—R. S. 686.

delivery of personal property in courts of record.¹ The proceedings are commenced by summons, to be issued by a justice of the peace of the county in which the property is found, and is directed in the usual way, to any constable of such county. With the summons is delivered to the constable the affidavit of the plaintiff, his agent or attorney of his title to the property, and must have endorsed thereon by the justice and signed by him, a direction to any constable of the county in which such justice shall reside, requiring such constable to take the property described therein from the defendant and keep the same to be disposed of according to law. The constable to whom said affidavit, indorsment and summons shall be delivered, shall forthwith take the property described in the affidavit, if he can find the same and shall keep the same in his custody. The Code requires that the affidavit should particularly describe the property to be taken;² and the constable should for his own protection see that it is so, else he may be liable to the one party or the other for seizing the wrong property. If it is not so described the constable should require the plaintiff to point it out to him; and if there is any doubt as to its identity, he should require an indemnity from the plaintiff. The property must be taken forthwith, and may be seized in any place within the county, but not out of the county, unless in case it has been removed after seizure, when the constable may follow it to regain possession. If the property or any part thereof be concealed in a building or inclosure, the constable shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county;³ when the constable shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.⁴

§ 1053. The Code further directs that on seizing the property, the constable shall without delay, serve upon the defendant a copy of such affidavit, notice and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable age and discretion. The copies of papers to be served are usually prepared by the plaintiff or the justice, and delivered to the constable with the original summons and affidavit; but if they are not, and the constable

¹ Ante, Ch. 20.

² Code, § 53, sub. 10.

³ Code, § 53, sub. 10; §§ 214, 215.

⁴ 1 Code, § 53, sub. 10.

should have to prepare them, he would be entitled to the fee prescribed by statute for such service.¹

§ 1054. When the property is seized and the papers served as mentioned, the constable shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the justice who issued the summons. If the defendant cannot be found and has no last place of abode in the city; or if no agent of the defendant from whose possession the property was taken can be found, the constable should state such facts in his return.² The return should be specific in stating when and where and what property was taken and where and on whom and when service of the papers were made. The return should be indorsed on the summons which should have attached to it the original affidavit.

§ 1055. The Code provides that the defendant may serve on the plaintiff or the constable who made the service, a notice in writing that he excepts to the sureties in the bond or undertaking.³ If the notice is served on the constable it would seem that he would be required to deliver the same to the plaintiff or his attorney.

§ 1056. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right of possession thereof, stating the grounds of such right and title, and serve the same upon the constable, the constable shall not be bound to keep the property or deliver it to the plaintiff unless the plaintiff on demand of him, or his agent, shall indemnify the constable against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavit that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders, and householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the constable unless made as aforesaid; and notwithstanding such claim when so made, he may retain the property a reasonable time to demand such indemnity.⁴

§ 1057. Though the Code declares that no claim to the property will be valid unless made in the manner prescribed, this must be understood only of the cases where the property is taken from the defendant or his agent, and not where the constable has taken the property from another party. The true owner in such case will have the right to bring an action for the recovery of the property against the constable or plaintiff or both.⁵

¹ Code, § 53, sub. 10.

² Code, § 53, sub. 10.

³ Code, § 53, sub. 10.

⁴ Code, § 216.

⁵ 4 Duer, 431, *King v. Orser*.

§ 1058. If a judgment is rendered and an execution issued thereon, if the judgment be for the delivery of the possession of personal property, it shall require the officer to deliver the possession of the same, particularly describing it to the party entitled thereto, and may, at the same time require the officer to satisfy any costs or damages recovered by the same judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable within sixty days after the receipt by the officer to the justice who issued the same.¹

CHAPTER VI.

VENIRE AND TRIAL.

§ 1059. Upon the demand of a trial by jury, by either party, the justice shall issue a venire directed to any constable within the county, wherein the cause is to be tried, commanding him to summon twelve good and lawful men, in the town where such justice resides, qualified to serve as jurors, and not exempt from serving on juries in courts of record, who shall be in no wise of akin to the plaintiff or defendant, nor interested in such suit, to appear before such justice, at a time and place named therein, to make a jury for the trial of the action between the parties named in such venire.² A party cannot demand a venire out of court and in the absence of the other party, and without proper notice to him and an opportunity to object to the constable to whom the same is proposed to be delivered for execution.³

§ 1060. The justice issuing the venire shall deliver, or cause the same to be delivered, to some constable of the county, disinterested between the parties, and against whom no reasonable objection shall have been made by either party.⁴ What is a reasonable objection, must in a great manner be left to the discretion of the justice. But no one should be selected to execute the venire, if the return made by him would be set aside upon a challenge to the array; or if there exists a settled hostility between the constable and the party objecting; or if he is upon terms of peculiar intimacy and friendship with the opposite party, so much so as to lead the justice to suspect his integrity, or that his feelings may be interested in behalf of the party.⁵ And no constable who shall have been employed to act, or who shall have acted as attorney or agent in respect to any claim or matter in contro-

¹ Code, § 53, sub. 10.

² 1 Cow. Tr. 558; 10 Wend. 514, Arnold v. Steeves.

³ 41 Barb. 147, Rice v. Buchanan.

⁴ 3 R. S. 441, § 88; Ante § 171, &c.

⁵ 1 Cow. Tr. 339.

versy, shall summon any jury in a justice's court, which shall be summoned to try any question in relation to any such claim or matter.¹

§ 1061. The constable to whom any venire shall be delivered, shall execute the same fairly and impartially, and shall not summon any person akin to either of the parties, or any person whom he has reason to believe biassed or prejudiced for or against either of the parties. He shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the venire and return to the justice.² The persons qualified to act as jurors, and who are exempt, and who will be excused, have already been pointed out.³ The venire may be executed either by reading the same to the juror, or by personally stating to him its contents. The jurors cannot be summoned by leaving a notice at their places of residence, as in the case of jurors drawn for a term of a court of record.

§ 1062. At the trial of the cause, the names of the persons so returned, and who shall appear, shall be respectively written on several and distinct pieces of paper, as nearly of one size as may be; and the constable in the presence of the justice, shall roll up or fold such pieces of paper as nearly as may be in the same manner, and put them together in a box or some convenient thing, to be drawn by the justice.⁴

§ 1063. If a sufficient number of competent jurors shall not be drawn, the justice may supply the deficiency by directing the constable to summon any of the bystanders or others who may be competent and against whom no cause of challenge shall appear, to act as jurors in the cause.⁵

§ 1064. If the constable to whom the venire shall have been delivered, do not return the same as thereby required, or if a full jury shall not be obtained upon drawing the names, or from the bystanders, the justice shall issue a new venire.⁶ The justice shall deliver such new venire to a proper constable for execution, as in the case of the first venire, who shall execute and return the same in the same manner in all respects as in the case of the first venire.

§ 1065. After hearing the proofs and allegations, the jury shall be kept together in some convenient place, under the charge of a constable, until they agree upon their verdict; and for that purpose the justice shall administer to such constable, the following oath: "You do swear in the presence of Almighty God, that you will to the utmost

¹ 3 R. S. 441, § 85

² 3 R. S. 441, § 89.

⁴ Ante, §§ 171, &c

⁵ 3 R. S. 441, § 90.

⁶ 3 R. S. 442, § 92.

⁷ 3 R. S. 442, § 93.

of your ability, keep the persons sworn as jurors on this trial, together in some private and convenient place, without any meat or drink, except such as shall be ordered by me; that you will not suffer any communication orally or otherwise to be made to them; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed upon their verdict, until they shall be discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed on.” The administering an erroneous oath to the constable, is fatal to the judgment.² And if the person sworn is not a constable it is error.³ If the jury do not retire; that is if they find a verdict on the spot, a constable need not be sworn.⁴ But if they retire, or the justice leaves them in his room together to make up the verdict, a constable must be sworn.⁵ The duties of the constable are sufficiently stated in the oath he takes. Any violation of his duty is declared a misdemeanor.

CHAPTER VII.

COMPELLING THE ATTENDANCE OF JURORS AND WITNESSES AND PUNISHING CONTEMPTS.

§ 1066. It is declared by statute that a justice of the peace may punish, as for a criminal contempt, by fine or imprisonment, or both, in his discretion, persons guilty of certain offences against the court, and for that purpose may issue his warrant to bring the offender before him to answer to the charge. If he adjudges him guilty of the contempt, and issues a warrant of commitment, such warrant must set forth the particular circumstances of the offence or it will be void.⁶ The constable before he executes the warrant should see that it is in due form; for if it is not he may be liable as a trespasser.

§ 1067. Every person who shall be duly summoned as a juror in an action before a justices' court, and shall not appear nor render a reasonable excuse for his default, or, appearing shall refuse to serve, shall be subject to the same fine, to be prosecuted for and collected with costs in the same manner, and applied to the same use as is provided by statute in respect to a person subpoenaed as a witness and not appearing, or appearing and refusing to testify.⁷

¹ 3 R. S. 442, § 100.

² 2 Caines 134, Day v. Wilber; 3 Caines 140, Reynolds v. Bedford.

³ 2 Cow. Tr. 355; 11 John. 442, Beekman v. Wright; Id. 532, Coughnet v. Easterbrook.

⁴ 8 John. 437, Fink v. Hall; 14 Barb. 381, Douglass v. Blackman.

⁵ 14 Barb. 381, Douglass v. Blackman.

⁶ 3 R. S. 460, §§ 199, 200, 201, 203.

⁷ 3 R. S. 443, § 103.

§ 1068. A subpœna in a civil case before a justice of the peace, may be served either by a constable, or any other person; and it shall be served by reading the same, or stating the contents to the witness, and by paying or tendering the fees allowed by law for one day's attendance of such witness.¹ When the service is made by a constable, his certificate is sufficient proof thereof. But when by a party not an officer, an affidavit is necessary.

§ 1069. Whenever it shall appear to the satisfaction of the justice, by proof made before him, that any person duly subpœnaed to appear before him in any cause, shall have refused or neglected, without just cause, to attend as a witness in conformity to such subpœna, (which proof may be by the affidavit of the party in the suit applying for the attachment, or by other competent testimony to the satisfaction of the justice,) and the party in whose behalf such witness shall have been subpœnaed, shall make oath that the testimony of such witness is material, the justice shall have power to issue an attachment to compel the attendance of such witness.² Every such attachment shall be executed in the same manner as a warrant, and the fees of the officer for issuing and serving the same, shall be paid by the person against whom the same shall have been issued, unless he shall show reasonable cause to the satisfaction of the justice, for his omission to attend; in which case, the party requiring such attachment shall pay all the costs of such attachment, and the service of the same.³

§ 1070. When a commission issued by a justice of the peace to take the testimony of a witness in a cause pending before such justice, is executed in this state, the commissioner shall have the same power to issue subpœnas, swear witnesses, and compel their attendance, as justices of the peace have.⁴

§ 1071. When a witness attending before a justice, in any cause, shall refuse to be sworn, in any form prescribed by law, or to answer any pertinent and proper question; and the party at whose instance he attended shall make oath that the testimony of such witness is so far material, that without it he cannot safely proceed to trial, such justice may, by warrant, commit such witness to the jail of the county.⁵ Such warrant shall specify the cause for which such warrant was issued, and if it be for refusing to answer any question, such question shall be specified therein; and such witness shall be closely confined pursuant to such warrant, until he submit to be sworn or to answer, as the case may be.⁶

§ 1072. Every person duly subpœnaed as a witness before a justice

¹ 3 R. S. 439, § 72.

² 3 R. S. 439, § 73.

³ 3 R. S. 439, § 74.

⁴ 3 R. S. 456, § 173.

⁵ 3 R. S. 461, § 204.

⁶ 3 R. S. 461, § 205.

of the peace, who shall not appear, or appearing shall refuse to testify, shall forfeit for the use of the poor of the town for such nonappearance or refusal (unless some reasonable cause or excuse shall be shown on his oath or the oath of some other person,) such fine, not less than sixty-two and a half cents, nor more than ten dollars, as the justice before whom the prosecution therefor shall be had, shall think reasonable to impose.¹ And such fine may be imposed by the justice, if the witnesses be present and have an opportunity of being heard against the imposition thereof.² The justice imposing any fine shall make up and enter in his docket a minute of the conviction, and of the cause thereof, and the same shall be deemed a judgment in all respects, at the suit of the overseers of the poor of the town.³ Upon the imposition of such fine, and in default of payment thereof, with costs, the justice shall forthwith issue an execution to any constable of the county directing him to levy such fine, with costs, of the goods and chattels of the delinquent, and for want thereof to convey him to the jail of the county, there to remain until he shall pay such fine and costs; and the keeper of such jail is required to keep such delinquent in close custody, in such jail, until the fine and costs be paid; but such imprisonment shall not exceed thirty days.⁴ When the money shall be collected on such execution, the constable shall return the same to the justice, and such justice shall pay over the amount of the fine imposed to the overseers of the poor of the town for the use of the poor.⁵

§1073. If any person who has been duly summoned to appear before any justice of the peace to testify in any suit pending in another state, shall refuse or neglect to appear at the time and place mentioned in the summons; or if, on his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offence on the trial of a suit in a justice's court.⁶

§ 1074. The proceedings prescribed for the punishment of a default by witness or juror, it has been decided may be had after the termination of the suit in which the default occurred. And that the justice may issue a warrant to bring the offender before him. A previous summons is unnecessary; a process commanding the officer to attach the defaulting juror and bring him before the justice, it is held is a sufficient warrant; and the validity of a conviction under this statute is not affected by the omission of the justice, to enter in his docket the minutes thereof made up by him.⁷

¹ 3 R. S. 439, § 75.

² 3 R. S. 349, § 76.

³ 3 R. S. 439, § 77.

⁴ 3 R. S. 440, § 78.

⁵ 3 R. S. 440, § 79.

⁶ 3 R. S. 681, § 44.

⁷ 25 N. Y. 583, *Robbins v. Gorham*
S. C. 26 Barb. 586.

CHAPTER VIII.

JUSTICES' EXECUTIONS. *a*

§ 1075. An execution on a judgment rendered by a justice, may be issued by the justice at any time within five years from the rendition of the judgment;¹ and any justice before whom any judgment shall have been entered, whose term of office shall have expired, may issue or renew executions on any such judgments, after the expiration of his said office, at any time within two years from the time said judgment shall have been rendered.²

§ 1076. The execution shall be directed to any constable within the same county, and shall command him to levy the debt or damages, and costs, of the goods and chattels of the person against whom the same shall be issued, (excepting such goods and chattels as are exempt by law from execution,) and to bring the money, at a certain time and place therein to be mentioned, before such justice, to render to the party who recovered the same; and if the execution be issued against a male person, it may, in a proper case, command the constable, that if no goods or chattels can be found, or not sufficient to satisfy such execution, to take the body of the person against whom the execution shall be issued, and convey him to the common jail of the county, there to remain until such execution shall be satisfied and paid.³ But no female shall be arrested or imprisoned, upon any execution issued from a justice's court.⁴ It is declared, as has been seen, that every execution issued by a justice of the peace, shall be entirely filled up, and shall have no blank either in the date or otherwise, at the time of its delivery to an officer for execution. Every such process, which shall be issued and delivered to an officer to be executed, contrary to the foregoing provision shall be void.⁵ And the process cannot be

¹ 1 Code, § 64, sub. 12.

² 3 R. S. 446, § 119.

³ 3 R. S. 446, § 120; 3 Wend. 403, Tay-

lor v. Fuller; 12 Wend. 145, Bar-
hydt v. Valk.

⁴ 3 R. S. 449, § 142.

⁵ 3 R. S. 454, § 159.

⁷ Ala.—R. C. p. 3241.

Ark.—1858, p. 649.

Cal.—Dig. 1860, p. 243.

Fa.—Dig. 1847, p. 471.

Ga.—Code, 803.

Ind.—2 R. S. 1852, p. 465; 5 Blackf.

(Ind.) 32, Baker v. Morton,

Kan.—Gen. St. p. 804.

La.—Laws 1860, p. 118.

Mich.—Laws 1857, pp. 1076, 1095.

Minn.—Rev. 1866, p. 432.

Miss.—Rev. Code, p. 135.

Mo.—Gen. St. 718; 29 Mo. 461, Gott v.

Williams; 13 Mo. 27 Campbell v. Lat-
rell; 8 Mo. 48, The State v. Lowry.

Neb.—R. S. 579.

Nev.—St. 1869, p. 279.

N. J.—Dig. 1855, p. 396.

N. C.—Rev. Code, 274, 333; Laws 1866,
p. 113

O.—1 R. S. 796.

On.—Gen. St. 592.

Penn.—Dig. 1861, p. 181.

Tex.—Laws 1866, p. 199.

W. Va.—St. 1863, p. 210.

Wis.—R. S. 696, 703.

amended by the justice after it has been executed, nor after a levy;¹ and a general authority to a constable to alter an execution or other process, or to fill up blanks is void.² Every execution issued by a justice, shall be dated on the day when it actually issued, and shall be returnable sixty days from the date of the same.³ If it is made returnable at a longer or a shorter period, it will be void, and the constable to whom it is delivered, should not execute the same, for it will afford him no protection.⁴ But it has been held that an execution made returnable "within sixty" days was not irregular or void.⁵

§ 1077. An execution against joint debtors, where all the defendants were not served with the summons or process by which the action was commenced, shall be indorsed by the justice with the name of the defendant who did not appear in the suit, or was not served, and the same shall be executed as executions similarly indorsed issued upon judgments in courts of record. That is, the defendant not served cannot be arrested on the execution, if it be against the body, nor can his separate property be seized; but the amount of the execution may be made out of the personal property owned by such defendant as a partner with any of the defendants who were served.⁶

§ 1078. It is the duty of every constable to whom an execution is delivered upon a judgment rendered by a justice of his county to receive, execute and return the same in person, and not by deputy, according to the commands thereof, if it is not in his own favor, and properly directed, and is not void upon its face. On receiving any execution the constable should see if it is duly signed by the justice, for if it is not, it is no execution; and whether it is directed to himself or to any constable of his town or county, and if it is not, he will not be required to execute it; whether it bears date more than five years after the rendition of the judgment, for a justice has no power to issue an execution on a judgment recovered before him after five years from the date of the judgment; and whether all the blanks are filled, else it will be void. The constable should also see that the person he is directed to arrest, or whose property he is required to seize under the execution, is rightfully named in the execution. It is not sufficient that he arrests or levies on the property of the person intended. He must be rightfully named in the execution.⁷

¹ 5 Wend. 276, *Toof v. Bentley*.

² 10 John. 405, *Pierce v. Hubbard*; 20 John. 63, *The People v. Smith*.

³ 3 R. S. 447, § 127; Code, § 64, sub 3.

⁴ 5 Wend. 276, *Toof v. Bentley*; 9 Wend. 338, *Farr v. Smith*.

⁵ 16 Barb. 585, *Price v. Shippa*.

⁶ 3 R. S. 447, §§ 124, 125; Ante, § 439.

⁷ 3 R. S. 460, § 198; Ante §§ 1036, 1039, 1030; 3 R. S. 454, § 153; Ante §§ 2, 422, 56, 282, &c., 434; 1 Kern. 281, *Morse v. Gould*.

§ 1079. The powers, duties, and liabilities of a constable in the service of an execution against property, from a justice's court, are with some slight exceptions, the same as those imposed upon sheriffs under similar process from courts of record. These will be found under the proper heads, in the preceding part treating of the duties of sheriffs. He has the same right as the sheriff to call upon individuals, or the power of the county even, to aid him in making a levy, repelling resisters or retaking the property after a rescue, and he is forbidden in the same way as sheriffs, from entering the dwelling without the defendant's leave to make a levy, though when he shall have entered lawfully he may, like the sheriff, break open all inner doors to come at the property, after a demand that they be opened and a refusal. And he is no more than a sheriff restricted in the amount of the levy to satisfy the execution; nor is he required to make the levy at the same time. If after having levied on property he thinks it will not be sufficient to satisfy the execution, he may make a further levy at any time during the life of the execution.¹ And where he has made the levy his rights and powers over the property are the same as in the case of sheriffs. And an execution will become dormant in the hands of a constable under the like circumstances as where it is held by the sheriff.

§ 1080. A justice's execution, unlike one issued from a court of record, or one issued by the county clerk, upon the transcript of a justice's judgment, does not bind the defendant's goods until an actual levy is made under it. Though, where the same constable receives a second execution against the same defendant, after he has made a levy under the first one, such levy will enure to the benefit of the second execution, though no actual levy should be made under such second execution; and this too, although the first execution had become dormant in the hands of the constable by reason of instructions from the plaintiff to delay, for the levy in such case is still good as against the defendant in the execution.² In all cases, the priority of liens of justices' executions, is determined by the time of the actual levy,³ unless in the case of an execution upon a judgment obtained in an action commenced by attachment, where the lien of the attachment continues after the obtaining the judgment for a sufficient time to allow of a levy under the execution.⁴ No levy by any other officer can divest the constable of his levy when duly made. And where a deputy sheriff levied on property under an execution subsequently

¹ 22 Barb. 522, *Denvrey v. Fox*.
² Com. 451, *Peck v. Tiffany*.

³ 13 John. 249, *Wylie v. Hyde*.

⁴ Ante, § 1038; Laws 1831, Ch. 300; § 39.

issued, and sold the property, he was held liable to account to the constable.¹ And where there was a valid levy on goods by a sheriff under one execution, it was held that while a constable might also levy on them, yet he had no right to remove them, and if he did, that he was liable to the sheriff.²

§ 1081. Under an execution issued by a justice of the peace, the same goods and chattels can be seized and sold, as upon executions from courts of record. Nothing but goods and chattels, including personal and moveable goods however, can be taken under it. And the same property is exempt from levy and sale whether the execution is from a court of record or a justice's court. Neither the judgment nor execution attaches as a lien upon real estate or chattels real, nor to anything affixed to the freehold, unless it be such fixtures as are liable to levy and sale upon execution apart from the freehold. A tenancy at will or by sufferance, is declared by statute to be a chattel interest, but the same section also provides that it cannot as such be sold on execution.³ Where the suit is commenced by attachment, and the defendant is not personally served with the attachment or summons, and does not appear, the execution cannot be levied upon any other property than such as was seized under the attachment.⁴

§ 1082. The levy, if property subject to the execution can be found, should be made forthwith, unless the defendant will pay the execution. At all events, such levy should be made sufficiently long before the return day of the execution, to allow the property to be duly advertised and sold, as no levy or sale can be made after the return day of such execution, unless the same shall have been renewed. And if the same is renewed, such levy and sale must be made within the time for which such execution is renewed.⁵ If goods have been levied on before such renewal, but have not been sold, they should, on the renewal of the execution, be again levied on, for the levy is gone.⁶ But it has been held that where no sale has been made for want of buyers, the execution may be renewed on the last day, so as to continue the lien.⁷

§ 1083. As the execution is returnable sixty days from the date of the same, and as it creates no lien upon the goods of the defendant, until actual levy, it is not necessary that the constable should, like the sheriff, mark upon it the time of its receipt by him, though it will be well for him to do so. But the constable is required, after taking goods and chattels into his custody, by virtue of an execution, to indorse

¹ 19 Barb. 412, *Betts v. Hoyt*.

² 55 Barb. 620, *Benson v. Berry*.

³ 3 R. S. 10, § 5.

⁴ Laws 1831, Ch. 300, § 39.

⁵ 3 R. S. 450, § 145.

⁶ 2 Cow. Tr. 545.

⁷ 7 Barb. 70, *Chapman v. Fuller*.

thereon, the time of levying the same, with an inventory of the articles levied on. If the articles are numerous, they may be enumerated on a separate paper, which should be attached to the execution, and the officer, by an indorsement on the execution of the time of the levy, should refer to such annexed inventory.¹

§ 1084. The constable may, like the sheriff, call a jury to try the title of any claimant to the property levied on by him, and with the like effect. Six jurymen would seem to be sufficient in such case.² And he may also, like the sheriff, take a receiptor for the property seized; and he has the same rights in respect thereto, as the sheriff in similar cases, except that he must demand the property of the receiptor within the life of the execution, otherwise his lien is gone, and he cannot maintain an action upon such receipt.³

§ 1085. Immediately after a levy, the constable shall give public notice by advertisement, signed by himself, and put up in three public places in the city or town where such goods and chattels shall have been taken, of the time and place within such city or town, when and where they will be exposed for sale. Such notice shall describe the goods and chattels taken, and shall be put up at least five days before the time appointed for the sale.⁴ Though the statute requires that the notice shall be posted immediately after the levy is made, yet if it is posted in sufficient time to make sale in pursuance thereof, before the return day of the execution, it will be sufficient. The notice must be posted, and the sale must be had, in the town where the goods are taken, and cannot as in the case of a sale by the sheriff be made in any town in the county.⁵ The powers and duties of the constable upon the sale, are the same as those of sheriff, on the sale of goods on execution.⁶ No constable or other officer shall directly or indirectly purchase any goods or chattels at any sale made by him upon execution, but every such purchase shall be absolutely void.⁷ If no bidders attend the sale, the officer shall postpone it, and give notice to the plaintiff, who should attend and bid himself, and if he do not the constable is justified in returning that the property remains on his hands for want of bidders; and so he would be excused, if he could not sell the property but at a great sacrifice. Yet after such return he must proceed to sell at the first opportunity.⁸

§ 1086. If the constable has not before the return day made the

¹ 3 R. S. 448, § 1317; Cow. Tr. 546.

² Ante, § 446; 7 Wend. 236, *Platt v. Sherry*; 8 Cow. 65, *Curtis v. Patterson*; 10 John. 98, *Townsend v. Phillips*.

³ 9 John. 361, *Brown v. Cook*; 23 Wend. 606, *Burrell v. Acker*.

⁴ 3 R. S. 448, § 131.

⁵ 2 Cow. Tr. 547.

⁶ Ante, §§ 478, &c.

⁷ 3 R. S. 448, § 133.

⁸ 2 Cow. 421, *Pixley v. Butts*.

whole amount of the execution, or arrested the defendant,¹ if it be against the body, the execution may from time to time be renewed by the justice issuing the same, by an indorsement thereon, signed by him, and dated of the day when renewed.² Such execution may be renewed, although there has been a levy of sufficient property to satisfy it, if there has not been sufficient time to make sale before the return day;³ and it has been held that it may be renewed on the last day, so as to retain the lien of the levy when the property could not be sold for want of bidders.⁴ And it may be renewed at any time after the return day, and as often as necessary.⁵ It has been determined that the limitation in the Revised Statutes concerning the issuing of executions, applies to the issuing thereof solely, and not to the renewal of such executions, and that where an execution had been duly issued and returned unsatisfied, it might be renewed by the justice after the two years from the rendition of the judgment had elapsed. But it is intimated in the opinion of the court, that as the Code does not provide in terms for the renewal of an execution, but limits the time of issuing one to five years from the entry of the judgment, the issuing and renewal of an execution probably ought to be considered as one and the same thing, and it would be held that neither could be done after five years.⁶ If the renewal is not signed by the justice, it is void, and the constable acting under it will be a trespasser.⁷ If any part of the execution has been satisfied, the indorsement of renewal shall express the sum due on the execution;⁸ though if it does not the constable will not be a trespasser, if he does not seek to collect more than the sum due.⁹ Every such indorsement shall be deemed to renew the execution in full force in all respects for sixty days from the date of the renewal.¹⁰ Before the execution is renewed, the constable should make the proper return thereto, that he can find no goods or chattels of the defendant in his county whereof to make the amount of the execution; or if the execution is against the body, that the defendant cannot be found in the county; or if a levy has been made and a part realized, he should state how much and return that he could find no goods of the defendant to make the balance; or that he has levied on goods and chattels of the defendant but that they remain in his hands unsold for want of bidders.

§ 1087. Where the execution is against the body, the constable is

¹ 2 Cow. Tr. 511.

² 3 R. S. 448, § 128.

³ 1 Denio, 574, *The People v. Hopson*.

⁴ 7 Barb. 70, *Chapman v. Fuller*.

⁵ 1 Wend. 551, *Visger v. Ward*, 2 Cow. Tr. 511.

⁶ 1 Kernan 281, *Morse v. Gould*.

⁷ 12 Wend. 145, *Barhydt v. Valk* 2
Hill 329, *Ostrander v. Walter*.

⁸ 3 R. S. 448, § 128.

⁹ 2 Hill 329, *Ostrander v. Walter*.

¹⁰ 3 R. S. 448, § 129.

bound, first to search for property before he takes the body, and he has a reasonable time to make such search.¹ If the defendant declares that he has no property, the constable may arrest him at once, without seeking for any. But if, without seeking for property or inquiring of the defendant for any, he arrests him, he does it at his peril, and is liable if it appears that with reasonable diligence he might have found property.² Where the defendant sues for such arrest, he must show that there was property clearly subject to the execution, and that the constable had due notice of it.³ If the constable in such case can find no property, or if he has found some and duly sold it, and there still remains a balance due on the execution, he shall take the body of the defendant and convey him to the common jail of the city or county, the keeper whereof is required to keep such person in safe custody in jail until the debt is paid, or he is thence discharged according to law.⁴ Though the constable have until the return day, to execute the execution against the body, yet if he arrest the defendant before, and suffer him to go at large, it will be an escape, though he have him on the return day.⁵

§ 1088. In serving any warrant or execution for a forfeiture or penalty on a conviction before a justice under any statute, the officer may break open doors to make a levy or to arrest the defendant, if necessary, after a demand that they be opened, and a refusal.⁶ And when an arrest is made, if the warrant so require, he shall carry the defendant to the county jail, there to be detained during the time mentioned in said warrant. When the constable shall collect any money on such warrant or execution, he shall pay the same to the justice at the time he makes return to the warrant, the same as on executions in civil matters, unless otherwise provided by statute.

§ 1089. Whenever any recovery shall be had before a justice of the peace, for any penalty or forfeiture incurred by violating any provision contained in the ninth title of the twentieth chapter of the first part of the Revised Statutes, which is entitled "Of excise and the regulation of taverns and groceries;" or for any penalty or forfeiture incurred in violating any provision contained in the eleventh title of the same chapter, relating to fisheries, execution shall issue thereon immediately, and the justice shall indorse upon such execution, the cause for which such judgment was rendered; and in case no goods or chattels can be found to satisfy such execution, the constable having the same shall commit such defendant to the jail of the county, and

¹ 4 Wend. 639, *Hollister v. Johnson*; 12

Wend. 148, *Barhydt v. Valk*.

² 4 Wend. 639, *Hollister v. Johnson*.

³ 12 Wend. 145, *Barhydt v. Valk*.

⁴ 3 R. S. 448, § 134.

⁵ 13 John. 503, *Pulver v. McIntyre*.

⁶ 2 Cow. Tr. 322.

shall deliver to the keeper thereof, a certified copy of such execution and indorsement by virtue of which, such keeper shall detain such defendant for a period not exceeding sixty days, without allowing him the benefit of the liberties of the jail.¹

§ 1090. A constable, as has already been seen, cannot levy, or sell, or arrest a defendant, on an execution after the return day, unless it has been duly renewed; nor, in such case, can he do any act under the renewed execution, after the expiration of the time, or times, for which the same may have been renewed.² But if the execution be against the body, and the defendant has been duly arrested thereon, and escapes without the knowledge or assent of the officer, he may be retaken after such time expires.

§ 1091. Whether the constable has collected the whole or any part of the execution, or he can find no goods, or whether he has or has not arrested the defendant, it is his duty to return the execution by the return day, to the justice who issued the same, and pay to him the debt or damages and costs levied, or so much thereof as he may have collected, returning the overplus, if any, to the person against whom the execution was issued.³ If a constable neglect to return an execution within five days after the return day thereof, the party in whose favor the same was issued may maintain an action of debt against such constable, and shall recover therein the amount of the execution, with interest from the time of the rendition of the judgment upon which the same was issued; and if a judgment be obtained in such suit against the constable, execution shall immediately issue thereon.⁴ The constable may show by parol that he has returned an execution, when sued for neglect, though the justice has not entered it in his docket.⁵

§ 1092. If the constable has made nothing on the execution, he should return that the defendant has no goods or chattels in his county, whereof he can make the amount of the execution, or simply "nulla bona." If he has made the whole or any part of the moneys, he shall pay the same to the justice who issued the execution, and make return that he has collected the amount of the execution, or simply "satisfied." If only a part of the moneys is made, he shall state how much he has collected, and that the defendant has no goods or chattels whereof to make the balance of the moneys. If the constable have two executions against the same defendant, levied at the same time, and there is not sufficient realized to pay all, he must pay dollar for dollar on

¹ 3 R. S. 447, § 126.

² 2 R. S. 450, § 145.

³ 3 R. S. 448, § 132.

⁴ 3 R. S. 449, § 143.

⁵ 6 Hill 487, *James v. Hartney*.

each execution, until the smaller execution is paid, and then apply the balance on the larger execution. They are not in such case to be paid in proportion to the amounts of the executions, but equally.¹ After a constable has returned an execution "satisfied" by sale, he cannot afterwards amend that return by a supplementary indorsement on the execution that he has been sued and a recovery had against him for the property.²

§ 1093. Any constable to whom any execution shall have been issued and delivered, and whose term of office shall expire before the time within which the collection or return of such execution is required by law, shall and may proceed in all matters relative to such execution, in the same manner as if the term of office of such constable had not expired.³

§ 1094. When there is an appeal from a justice's judgment, after execution issued, the constable holding the execution shall, on being served with a copy of the undertaking on the appeal, certified by the justice, stay all proceedings on the execution.⁴ If, however, he has made a levy, or arrested the defendant, before he is so served with the copy of the undertaking, he is not to release either, but is to retain the prisoner or the goods levied on, until the decision of the appeal.

§ 1095. When the execution is on a judgment in replevin, and directs a delivery of the property taken, it will be the duty of the constable to demand the property of the party holding it, or if it can be reached, seizing it and delivering it to the party entitled thereto. If the party holding the property refuses to deliver it, and secretes it in his dwelling and refuses admittance to the officer, it is doubtful whether he can, after demand and refusal, forcibly enter to take the property. The safer course for the constable will be not to resort to violent measures; and if he cannot come at the property, then to collect the amount directed to be collected in such case, and if the party has no property, to return the facts and leave the party entitled to the property to his remedy on the undertaking.

§ 1096. Whenever any execution issued upon a judgment obtained in any court in the city of New York for work, labor or services done or performed by any female employee when such amount does not exceed the sum of fifteen dollars, exclusive of costs, shall be returned unsatisfied, the clerk of the court where such judgment was obtained, shall issue a further execution to any marshal of the city of New York, commanding him to collect the amount due upon such judgment or in default thereof, to arrest the defendant in such execution

¹ 1 Cow. 215, *Campbell v. Ruger*.

² 11 Barb. 481, *Ross v. Hicks*.

³ 3 R. S. 461, § 208.

⁴ Code, § 357.

and convey him to the jail or debtor's prison of the city of New York and commanding the jailer of said jail to keep the said defendant without the benefit of the liberties of the jail until the said defendant shall pay said judgment or be discharged according to law; but such imprisonment shall in no case extend beyond the period of five days.¹

CHAPTER IX.

DUTIES OF CONSTABLES IN SPECIAL PROCEEDINGS.

1. IN BASTARDY CASES.

§ 1097. If any woman shall be delivered of a bastard child, which shall be chargeable or likely to become chargeable, to any county, city or town; or shall be pregnant of a child likely to be born a bastard, and to become chargeable to any county, city or town, the superintendents of the poor of the county, or any of them, or the overseers of the poor of the town or city, or any of them, where such woman shall be, shall apply to some justice of the same county to make inquiry into the facts and circumstances of the case.²

§ 1098. Such justice shall, by examination of such woman on oath, and upon such other testimony as may be offered, ascertain the father of such bastard, or of such child likely to be born a bastard; and shall thereupon issue his warrant, directed to any constable of the county, commanding him forthwith to apprehend such reputed father, and to bring him before such justice, for the purpose of having an adjudication respecting the filiation of such bastard, or of such child likely to be born a bastard.³ The warrant is not required to be under seal.⁴ The warrant cannot be executed by the sheriff of the county. It must be directed and delivered to any constable of the county.

§ 1099. The constable to whom such warrant shall be delivered for execution, shall immediately apprehend such reputed father and bring him before such justice. The warrant, however, continues in force until it is fully executed; and if the party, after arrest, is allowed to go at large or escapes, he may be again arrested. The proceedings are quasi criminal in their character, but it is not conceived that the officer holding the warrant would be authorized in executing the same like criminal process. The safer course will be for the officer to proceed upon the warrant as upon process for the arrest of the defendant in a civil action. The warrant may be executed in any

¹ Laws 1867, Ch. 516, §§ 1, 2.

² 2 R. S. 907, § 5.

³ 2 R. S. 907, § 6.

⁴ 42 Barb. 215, *Millett v. Baker*.

part of the county, and in the day or night, but not upon Sunday; and the door of the defendant's dwelling house cannot be broken open to arrest him in the first instance. But it is otherwise if, after due arrest, he shall have escaped.

§ 1100. If the person charged as such reputed father shall be, or reside, in any other county of the state than that in which such warrant issued, the justice issuing the same shall, in writing thereon direct the sum in which any bond shall be taken of the person so charged; and it shall be the duty of the constable, or other proper officer having the same, to carry it to some justice of the city or county wherein such person resides, or can be found. The justice to whom the same shall be presented, on proof being made to him of the handwriting of the justice who issued such warrant, shall indorse his name thereon, with an authority to arrest such person in the county where the justice so indorsing shall reside; which shall be a sufficient authority to the person bringing such warrant, and to all others to whom it was originally directed, to execute the same in the county where it was indorsed.¹

§ 1101. Upon the person so charged being apprehended, he shall be carried before the justice who indorsed the said warrant, or some other justice of the same county, who may take from such person a bond to the people of this state, with good and sufficient sureties, in the sum so directed in the said warrant, with condition to indemnify the county, and town or city, where the said bastard shall have been born, or where the woman likely to have such bastard shall be, and every other county, town or city which may have incurred any expense, or may be put to any expense for the support of such child, or of its mother during her confinement and recovery therefrom, against all such expenses, and to pay the costs of apprehending such father, and of any order of filiation that may be made; or such justice may take from the person so charged and apprehended, a bond as aforesaid, in the sum directed on said warrant, with good and sufficient sureties, conditioned that such person will appear at the next court of sessions to be holden in the county where such warrant was originally issued, and not depart the said court without its leave.²

§ 1102. Upon a bond being so entered into, with either of the conditions aforesaid, the justice taking the same shall discharge the person so apprehended from the arrest, and shall indorse upon the warrant a certificate to that effect. He shall deliver the warrant, with the bond so taken by him, to the constable who brought such warrant, who

¹ 2 R. S. 907, § 7.

² 2 R. S. 907, § 8; 1 Hill, 293, *The People v. Meighan*.

shall deliver the same to the justice who granted the same, who shall proceed thereupon in the same manner as if such bond had been taken by him.¹

§ 1103. Every constable or other officer to whom any bond of the putative father of a bastard, or of a child likely to be born a bastard, taken out of the county where the warrant was issued, shall be delivered as hereinbefore directed, who shall neglect or refuse to deliver the same to the justice who issued such warrant, within fifteen days after the receipt of the same, shall forfeit the sum of twenty-five dollars, to be sued for and recovered by and in the name of any overseers of the poor, or county superintendents, at whose instance the said warrant was issued.²

§ 1104. If the person so charged and apprehended shall not execute the bond so required, with one or other of the conditions aforesaid, to the satisfaction of the justice before whom he shall be brought, then the constable or other proper officer having such warrant, shall take the person so apprehended before the justice who originally issued the warrant.³

§ 1105. If any justice who shall have issued any warrant for the apprehension of the father of a bastard, or of a child likely to be born a bastard, shall have died, vacated his office, or be absent on the return of such warrant, the constable who may apprehend such father shall convey him before some other justice of the same town, who shall have the same authority to proceed thereon, as the justice who issued such warrant.⁴ In such case the constable's return to the warrant should show the death, vacancy, or absence of the justice who issued the warrant, before any other justice should take cognizance of the matter.

§ 1106. During the examination of the person charged, and until such person shall be discharged by the justice before whom the examination is had, he shall remain in the custody of the constable who apprehended him, unless a bond shall have been taken for his appearance, as provided by statute; and when committed to any jail by the order of such justice, he shall be confined therein, without being let to bail, and without being entitled to the liberties thereof.⁵

§ 1107. In making any examination in such case, the justice or justices may compel the mother of the bastard so chargeable or likely to become chargeable, or a woman pregnant with child likely to be born a bastard and to become so chargeable to testify and disclose the name

¹ 2 R. S. 908, § 9.

² 2 R. S. 919, §§ 70.

³ 2 R. S. 908, § 10.

⁴ 2 R. S. 919, § 72.

⁵ 2 R. S. 909, § 17.

of the father of such bastard child; and in case of her refusal may, after the expiration of one month from the time of her delivery, if she shall be sufficiently recovered, commit her to the common jail of the county by warrant under his, or the hands of such justices, in which the cause of the commitment shall be distinctly set forth, there to remain until she shall testify and disclose the name of such father.¹ In executing the warrant or order of commitment in such case the powers of the constable are the same as in making the arrest, or committing the father of such bastard to prison. The manner in which the father and mother of a bastard shall be committed to jail and confined therein, and how and when they may be discharged therefrom, will be found under the duties of sheriffs as keepers of jails in criminal cases.²

2. IN CASES OF LUNACY.

§ 1108. In case of the refusal or neglect of any committee of any lunatic, who has become furiously mad, or so far disordered in his senses as to endanger his own person, or the person or property of others, if permitted to go at large, or of his relations, to confine and maintain such person, in such manner as shall be approved by the overseers of the poor of the city or town; or where there is no committee or relative of sufficient ability, it shall be the duty of the overseers of the poor of the city or town where any lunatic or mad person shall be found, to apply to any two justices of the peace of the same city or town, who, upon being satisfied upon examination, that it would be dangerous to permit such lunatic to go at large, shall issue their warrant, directed to the constables and overseers of the poor of such city or town, commanding them to cause such lunatic or mad person to be apprehended, and to be safely locked up and confined in such secure place as may be provided by the overseers of the poor to whom the same shall be directed.³

§ 1109. Any two justices of the peace of the city or town where any such lunatic or mad person shall be found, may, without the application of any overseers of the poor, and upon their own view, or upon the information or oath of others, whenever they deem it necessary, issue their warrant for the apprehension and confinement of such lunatic or mad person as aforesaid.⁴

§ 1110. Such warrants are to be directed to the constables and overseers of the poor of the city or town where such lunatic is. This does not require that all such officers of such city or town should unite in the execution of the warrant. It will be sufficient, if it is

¹ 2 R. S. 910, § 20.

² Ante §§ 240, &c.

³ 2 R. S. 883, § 4.

⁴ 2 R. S. 883, § 8.

delivered to any one of such constables. He may make the arrest of such lunatic, and deliver him into custody and safe keeping at the place provided by the overseers of the poor to whom the same shall be also directed. The arrest should be made as upon a warrant in a civil action.

§ 1111. It shall be the duty of the overseers of the poor to whom such warrant shall be directed, to procure a suitable place for the confinement of such lunatic.¹ Such place shall be within the town or city of which such overseers may be officers, or within the county in which such city or town may be situated, or in the county poor-house in those counties where such houses are established, or in such private or public asylum as may be approved by any standing order or resolution of the supervisors of the county in which such city or town may be situated, or in the lunatic asylum in the city of New York.² But no such lunatic shall be committed as a disorderly person, to any prison, jail, or house of correction, or confined therein, unless an agreement shall have been made for that purpose with the keepers thereof; or in any other way, than as herein directed.³ And no such lunatic shall be confined in the same room with any person charged with or convicted of any crime; nor shall any such person be confined in any such place more than ten days, and if he continue furiously mad or dangerous, he shall be sent within ten days to the state lunatic asylum, or to such public or private asylum as may be approved by a standing order or resolution of the supervisors of the county.⁴

§ 1112. Any overseer of the poor, constable, keeper of a jail, or other person, who shall confine any such lunatic or mad person, in any other manner or in any other place than such as are herein prescribed, shall be deemed guilty of a misdemeanor; and on conviction shall be liable to a fine not exceeding two hundred and fifty dollars, or to imprisonment not exceeding one year, or both, in the discretion of the court before which the conviction shall be had.⁵

3. HABITUAL DRUNKARDS.

§ 1113. Any person designated by the overseers of the poor of any town, in the manner provided by statute, as an habitual drunkard, may apply to any justice of the peace of the city or town in which the person so designated resides, for process to summon a jury to try and determine such fact of drunkenness.⁶

§ 1114. On such application, the justice shall immediately give

¹ 2 R. S. 883, § 5.

² 2 R. S. 883, § 4.

³ 2 R. S. 883, § 6.

⁴ 2 R. S. 889, § 35.

⁵ 2 R. S. 884, § 11.

⁶ 2 R. S. 101, § 3.

notice thereof, in writing, to the overseers of the poor, specifying the time and place where the parties shall meet for the trial of such fact, and shall issue a venire to any constable, to summon a jury of twelve persons, competent to serve on juries, to appear at the said time and place, for the purpose of trying the said fact.¹

§ 1115. Such jury shall be summoned, returned, and six of them shall be balloted for by such justice, and shall be sworn well and truly to try the fact of the alleged drunkenness, in the same manner as for the trial of issues in suits brought before a justice of the peace; and witnesses shall be summoned, and their attendance and testimony enforced, and they shall be sworn and examined before the said jury in the like manner.²

§ 1116. If a judgment is rendered for either party for the costs of the proceeding, the justice shall issue execution thereon, and the constable to whom the same is directed and delivered, shall execute the same in the like manner as executions in civil cases.³

4. IDLE AND TRUANT CHILDREN.

§ 1117. It shall be the duty of all police officers and constables, who shall find any child between the ages of five and fourteen years, having sufficient bodily health and mental capacity to attend the public schools, found wandering in the streets or lanes of any city or incorporated village, idle and truant, without any lawful occupation, to make complaint to a justice of the peace, public magistrate, or justice of the district court in the city of New York, to the end that such child may be proceeded against according to the provisions of the statutes.⁴ And any such officer shall execute the warrant of such magistrate requiring him to bring such child before the magistrate issuing the same, for examination; and also any warrant for commitment he may make for confining such child in any place that may be provided for the reception of such idle and truant children in such city or village.

5. HAWKERS AND PEDLARS.

§ 1118. Every person trading as a hawker and pedler, who shall refuse to produce a license as a hawker and pedler to any officer or citizen who shall demand the same, shall, for each offence, forfeit the sum of ten dollars, to the overseers of the poor of the town in which the demand shall be made, for the use of the poor therein; and any such offender, who, after notice, shall refuse or neglect to pay the

¹ 2 R. S. 901, § 4.

² 2 R. S. 902 § 5.

³ 2 R. S. 902, §§ 8, 9.

⁴ 2 R. S. 378, §§ 1, 5.

above penalty, shall be committed by the justice before whom the conviction shall be had, to the jail of the county in which the offence shall have been committed, for the term of one month.¹

§ 1119. Any citizen may apprehend and detain any person who shall be found trading as a hawker or pedler, without license, or contrary to the terms of his license, or who shall refuse to produce his license in violation of the statute; and may convey the offender before any justice of the peace in the town or county in which he shall be apprehended.²

§ 1120. It shall be the duty of such justice, if sufficient license to authorize such trading be not produced to him, and the fact of trading be proved to him, either by the confession of the person so apprehended, or the oath of competent witnesses, to convict the offender of such offences as shall be so confessed or proved; and to issue his warrant on each conviction, directed to some constable of the county in which the conviction shall be had, commanding such constable to cause the sum of twenty-five dollars, with costs, not to exceed five dollars, to be forthwith levied by distress and sale, at public vendue, of the goods, wares and merchandize of the offender. The moneys collected on such warrant, exclusive of the costs, shall be paid by the justice to the overseers of the poor of the town in which the offence shall have been committed.³

§ 1121. No costs shall be allowed to the defendant in any such case, if it shall appear that before the commencement of the prosecution, such defendant had refused to produce his license, or to disclose his name when lawfully required; nor in such case shall the defendant be entitled to maintain any action against the person prosecuting him, or the constable, or other persons by whom he may have been apprehended, or the justice issuing any warrant or other process against him, or before whom he may have been tried, for any of their acts in so prosecuting, apprehending or trying him.⁴

6. UNDER THE HIGHWAY LAWS.

§ 1122. The justice to whom any complaint shall be made by any overseer of highways of his town, that any person has incurred any penalty under the highway laws of this state, shall forthwith issue a summons directed to any constable of the town, requiring him to summon such delinquent, to appear forthwith before such justice, at some place to be specified in the summons, to show cause why he should not be fined according to law for such refusal or neglect; which sum-

¹ 2 R. S. 473, § 7.

² 2 R. S. 473, § 8.

³ 2 R. S. 473, § 9.

⁴ 2 R. S. 474, § 10.

mons shall be served personally, or by leaving a copy at his personal abode.¹ But as the proceedings are summary, the officer should use reasonable diligence to find the person proceeded against, in order to make personal service if possible. If the delinquent is a corporation the summons may be served in the manner provided by law for the service of writs or summons issuing out of courts of record against corporations.²

§ 1123. If upon the return of such summons, no sufficient cause shall be shown to the contrary, the justice shall impose the proper fine, and shall forthwith issue a warrant under his hand and seal, directed to any constable of the town where such delinquent shall reside, commanding him to levy such fine, with the costs of the proceeding, of the goods and chattels of such delinquent.³ The constable to whom such warrant shall be directed, shall forthwith collect the moneys therein mentioned. The proceedings on the warrant are as summary as on the summons, and no property is exempt from levy and sale as in the case of executions in civil actions, but the goods should be advertised and sold in the same manner as on executions in civil actions. If the warrant is against an individual, the constable shall pay the fine, when collected, to the justice who issued the warrant;⁴ but if it be against a corporation, it shall be paid over to the commissioner of highways of the town, by the constable collecting the same.⁵

7. SUMMONING JURIES TO ASSESS DAMAGES ON OPENING HIGHWAYS.

§ 1124. When a jury shall be required for the purpose of assessing the damages of any party on opening a highway, and a list of the names of the requisite number of jurors shall have been made and certified and delivered to a justice of the peace of the town wherein the damages are to be assessed; it shall be the duty of such justice forthwith to issue a summons to one of the constables of his town, directing him to summon the persons named in said certificate, and shall specify a time and place in said summons, at which the persons to be summoned shall meet; but no meeting of such persons shall be had within twenty days from the filing the assessment of damages in the town clerk's office by the commissioner or commissioners of highways.⁶ The service of such summons on such jurors should be personal, if they can be found; but if not, then the same may be made by leaving a notice of the selection of such person, and the time and place, and the purpose for which he is required to attend, at his place

¹ 2 R. S. 391, § 55.

² 2 R. S. 387, § 33; Ante, § 351, sub. 1.

³ 2 R. S. 391, § 56.

⁴ 2 R. S. 391, § 57.

⁵ 2 R. S. 387, § 23.

⁶ 2 R. S. 398, § 87.

of residence, with some member of his family of suitable age and discretion.

8. ENCROACHMENTS UPON HIGHWAYS.

§ 1125. If the occupant of land, to whom notice is given that his fences encroach upon the highway, shall within five days deny such encroachment, the commissioners of highways, or some one of them shall apply to any justice of the peace of the county for a precept, directed to any constable of the town, to summon twelve freeholders thereof, to meet at a certain day and place to be specified in such precept, and not less than four days after the issuing thereof, to inquire into the premises.¹

§ 1126. The jurors must not only be freeholders and residents of the town, but they should not in any wise be interested in the question, nor of kin to the party, and neither prejudiced for or against him.

§ 1127. It is the duty of the constable to select the jurors, and the justice issuing the precept has no power to designate who shall be selected and who not. And it is irregular for him to annex the names of the jurors to be summoned by the constable, to such precept; but if he does so, and the persons so selected by him are not objected to, the irregularity will be deemed waived.² Nor can the justice pass upon the competency of the jurors summoned. All his powers are exhausted in issuing the precept and swearing the jurors and witnesses.³

§ 1128. The constable to whom such precept shall be directed, shall give at least three days' notice to the commissioners of highways of the town, and to the occupant of the land, of the time and place at which such freeholders are to meet.⁴ Such notice may be given verbally, or by writing.

§ 1129. If the jury find that any encroachment has been made, the occupant shall pay the costs of such injury; and if the same shall not be paid within ten days, the justice shall issue a warrant for the collection thereof, in the manner provided in the case of one refusing to perform highway labor.⁵

9. DRAINING SWAMPS.

§ 1130. The justice of the peace to whom application shall be made for a summons to summon a jury, under the statutory proceedings for the draining of swamps, marshes and other low lands, by any person

² 2 R. S. 407, § 143.

¹ 2 Hill 472, *Mott v. The Comr's of Highways of Rush*.

³ 3 Wend. 468, *Pugsley v. Anderson*.

⁴ 2 R. S. 407, § 143.

⁵ 2 R. S. 407, § 145.

entitled thereto, shall thereupon issue a summons directed to any constable of the town where the lands are, and in which the justice resides, requiring him to summon twelve reputable freeholders, who are not interested in the said lands, nor in any of them, nor in any wise of kin to either of the parties, to be and appear on the premises at a certain time to be specified in such summons, not less than ten, nor more than twenty days from the date thereof. The summons shall also direct the constable to give at least six days' notice to the owner of such lands, of the time at which such jury is to appear.¹

§ 1131. The constable to whom such summons shall be delivered shall execute the same by summoning such jurors in the same manner and with the like authority, as upon venire issued in causes pending before justices of the peace, and shall in like manner make return thereof, and of the fact of his having given the notice therein required.²

10. SEARCH WARRANT FOR GOODS PAWNED.

§ 1132. Whenever any person shall make oath before any justice of the peace, police justice or assistant justice, that any property belonging to him has been embezzled or taken without his consent, and that he has reason to believe and suspect, and does suspect, that such property has been pledged with any pawnbroker, such justice, if satisfied of the correctness of such suspicions, shall issue his warrant, directed to any constable of the city or place, commanding him to search for the property so alleged to have been embezzled or taken, and to seize and bring the same before such justice.³

§ 1133. The constable to whom any such warrant shall be directed and delivered, shall have the same power to execute the same, and shall proceed in the same manner as in the case of a search warrant, issued upon a charge of larceny.⁴ And when the property is seized, he shall bring the same forthwith before the officer issuing the warrant, to be disposed of by him.

11. WHEN SUMMONED TO ATTEND COURTS.

§ 1134. The constables summoned by the sheriff to attend any term of the court appeals, or of the supreme court, or any circuit court, court of oyer and terminer, or court of sessions, or county court, or any other court which shall be held in his county, shall attend thereat; and when the court is a circuit court, sittings, court of oyer and terminer, county court, or court of sessions, it is declared

¹ 3 R. S. 862, § 2.

² 3 R. S. 862, § 3; Ante, § 1059, &c.

³ 2 R. S. 980, § 9.

⁴ 2 R. S. 980, § 10; Ante, §§ 79, &c.

that every marshal or constable so summoned, shall attend the sitting of such court, upon pain of being fined for every day's neglect, a sum not exceeding five dollars.¹

§ 1135. It is the duty of every such constable so summoned to attend any such court, to keep the court house in order and to obey the orders and directions of the court, and of the sheriff, and to act as crier of such court, if no crier is appointed therefor.²

CHAPTER X.

ACTIONS AGAINST CONSTABLES.

§ 1136. The cases in which constables are criminally liable for any act, or neglect of duty in their office, have already been referred to under the appropriate heads, and will not be repeated.

§ 1137. It may be said generally, that constables are liable to an action at the suit of the party aggrieved, in the same cases, and under the same circumstances, as sheriffs are liable for any wilful or corrupt omission to discharge any official duty. They are so liable, where they refuse or neglect to make due service of a summons, or other process; or to make due return thereof. So where they refuse or neglect to arrest the defendant, or seize his property upon attachment or execution duly issued and delivered to them for execution; and for releasing a sufficient levy upon the defendant's property, and arresting him, whereby the debt is lost.³ And if moneys be collected by a constable upon an execution, and are not paid over by him according to law, an action of assumpsit may be maintained by the party entitled to such moneys, in his own name, upon the instrument of security given by such constable and his sureties; and in such suit, the amount so collected, with interest from the time of collection shall be recovered. Execution shall be immediately issued upon the judgment in such suit.⁴ But he will not be so liable where a recovery has been had against him for selling the property out of which the money was made, when such recovery is equal to the amount of the execution; and it makes no difference, that the plaintiff had indemnified the constable against the levy.⁵ So he is liable to a plaintiff in a senior execution, for paying over money, on a junior execution.⁶ If a constable neglect to return an execution within five days after the return day thereof, the party in whose favor the same was issued, may main

¹ 3 R. S. 278, § 4; Id. 479, §§ 70, 71, 72.

² 3 R. S. 278, § 4; Id. 479, § 72.

³ 7 Wend. 236, *Platt v. Sherry*; 1 Scam. (Ill.) R. 237, *Robinson v. Harlan*;

27 Ill. 440, *County Court, Calhoun Co. v. Buck*.

⁴ 3 R. S. 450, § 146.

⁵ 21 Wend. 264, *Newland v. Baker*.

⁶ 12 John. 162, *Sandford v. Roosa*.

tain an action of debt against such constable, and shall recover therein the amount of the execution, with interest from the time of the rendition of the judgment upon which the same was issued; and if a judgment be obtained in such suit against the constable, execution shall immediately issue thereon.¹ And it will not be necessary to show moneys collected by him. The constable becomes liable in such case by his mere neglect to return the execution alone.² But a constable is not liable in a case where the plaintiff has directed a renewal of the execution.³ The constable is also liable for an escape, and although he has the whole time the execution has to run to make an arrest, yet if he arrest the defendant, before the expiration of such time, and suffers him to go at large, it is an escape, though he has him at the return of the writ.⁴ And so if he discharges one by order of the justice who issued the execution, he is liable for an escape, unless the justice had special authority from the plaintiff to discharge him.⁵ But it will be a good defence to the constable if the process is void; or if the defendant in the process is exempt from arrest.⁶ He is also liable for a false return.⁷ A constable sued for not levying on property, who claims that it was exempt for levy and sale is bound to show that it was exempt and proof that the debtor was a householder has been held not sufficient.

§ 1138. Constables, like sheriffs, are also liable to the party aggrieved for any wrongful interference with the rights, property, or liberties of another, as where he arrests or seizes the goods of the wrong party; or seizes goods exempt from levy and sale; or for executing process, void upon its face; and he cannot defend a trespass of that character on the ground that he is a minor.⁸ So he is liable for the execution of process in an unwarrantable manner, with intent to vex, harass, and oppress the party.⁹ But a constable is not liable to the party where he agreed that if the defendant would turn out property on the execution, he would not sell under thirty days, should he sell before that time.¹⁰ It is an agreement without consideration and is void. He will be liable, for arresting the defendant before seeking for goods, if he could with reasonable diligence have found property.¹¹ But in such case the party complaining must show that there was property clearly subject to the execution, and that the constable

¹ 3 R. S. 449, § 143.

² 9 Wend. 233, *Lawton v. Erwin*; 10 Wend. 370, *Sloan v. Case*; 20 John. 74, *Warren v. Racy*.

³ 6 Cow. 659, *Homan v. Liswell*.

⁴ 13 John. 503, *Pulver v. McIntyre*.

⁵ 9 John. 146, *Van Slyck v. Taylor*.

⁶ 11 John. 433, *Ray v. Hogeboom*.

⁷ 14 John. 481, *Wheeler v. Lampman*; 3 Wend. 202, *Putnam v. Man*.

⁸ 23 Wend. 480, *Green v. Burke*.

⁹ 5 John. 125, *Rogers v. Brewster*.

¹⁰ 2 John. 193, *Goodale v. Holdridge*.

¹¹ 4 Wend. 639, *Hollister v. Johnson*.

had due notice of it.¹ And so, too, he will be liable to an action for false imprisonment, for detaining a defendant in a civil action, more than twelve hours after arrest, and before the commencement of the trial.² And he will also be liable if he executes, or attempts to execute process, requiring the seizure of the defendant or his goods, after the return day of such process. When replevin is brought against a constable and he has a verdict, the jury should assess the value of the property at the amount of his special interest therein under the execution.³

§ 1139. The liability of the sureties of the constable, upon his bond, is coextensive with his own liability to the party aggrieved. They are liable for any neglect of duty on an execution, and for not paying over money collected thereon,⁴ whether it was received before or after the termination of his term of office.⁵ So, too, his surety are also liable in case of his neglect to return an execution within the time limited by law, and it makes no difference that no money was actually collected by him on the execution.⁶ Any person to whom the constable has become responsible within the condition of the bond, may commence suit thereon, without previous leave being granted, in his own name;⁷ or if the bond be to the people, then he may so commence such action for his own benefit, in the name of the people.⁸ In an action against a constable and his surety, they will not be allowed to say that the execution was issued without authority, unless it was absolutely void.⁹ Nor can the surety object that the bond was not filed within the time required by statute; nor that it was not under seal; nor in the form required by statute,¹⁰ if it contains the substance thereof; nor that the sureties had not been approved by the clerk or supervisor of the town.¹¹ The sureties of a constable will not be discharged by the plaintiff assenting, without consideration, to a temporary delay by the constable in paying over moneys collected on the execution, there being no evidence that he offered to pay, or that the plaintiff loaned it to him.¹²

§ 1140. Actions against constables and their sureties must be commenced within the same time as those against the sheriff for like causes.¹³ And the proof necessary to support an action, or maintain the defence in such action, will be the same as in actions against sheriffs.

¹ 12 Wend. 145, *Barhydt v. Valk*.

² 1 Cow. Tr. 588.

³ 10 Wend. 514, *Arnold v. Steeves*; 23 Barb. 240, *Seaman v. Luce*.

1 R. S. 836, § 43; 3 R. S. 450, § 146.

⁶ 2 R. S. 461, § 209.

⁷ 10 Wend. 370, *Sloan v. Case*; 14 Cal. 146, *Van Pelt v. Luther*.

⁷ 2 Wend. 281, *The People v. Holmes*.

⁸ 2 Wend. 281, *The People v. Holmes*.

⁹ 2 Wend. 233, *Lawton v. Erwin*.

¹⁰ 2 Wend. 615, *Dutton v. Kelsey*.

¹¹ 12 Wend. 306, *Skellinger v. Yendes*.

¹² 4 Denio 55, *Boice v. Main*; 7 Blackf. (Ind.) 358, *Dickens v. The State*.

¹³ Ante, §§ 871, &c.; Code §§ 92, 94.

FEES OF SHERIFFS, CORONERS AND CONSTABLES.

CHAPTER I.

OF THE FEES OF OFFICERS GENERALLY.

§ 1141. As a general rule, sheriffs, coroners and constables are entitled to compensation for any service they or either of them may be required to perform, by virtue of their respective offices. In some cases, however, duties are imposed on them by law, which they are obliged to discharge without compensation. Thus, it is the duty of sheriffs to attend the sittings of courts of record held within their county, for which they are not entitled to compensation,¹ except the sheriff of Kings county, who is entitled to compensation for attending the city court of Brooklyn,² and the sheriff of Rensselaer who is entitled to compensation for attending the courts of his county.³ The cases, however, are few, where any officer is required to perform services without being entitled to ask and receive some compensation for such services.

§ 1142. It is declared that no judge, justice, sheriff, or other officer whatsoever, or other person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any other or greater fee or reward for such service, but such as is or shall be allowed by the laws of this state.⁴ No fee or compensation allowed by law, shall be demanded or received by any officer or person, for any service, unless such service was actually rendered by him. But this shall not prevent any officer from demanding any fee allowed for any service, of which he is entitled by law to require the payment, previous to rendering such service.⁵ A violation of the foregoing provisions is declared a misdemeanor; and the person guilty thereof is made liable to the party aggrieved, for treble the damages sustained

¹ 2 Hill 411, Ex parte, Miner.

² Ante, § 156.

³ Laws 1866, Ch. 605.

⁴ 3 R. S. 930, § 5.

⁵ 3 R. S. 931, § 6.

by him.' And it is made the duty of every court at which a grand jury shall be summoned, to charge such jury specially to inquire into any violations of law by public officers, in demanding, charging or receiving fees to which they are not entitled by law.² The provisions of law prohibiting the taking of any fees for services in civil cases, other than such as are allowed by statute, shall apply to the taking of fees for services in criminal cases beyond the amount allowed by law for such services.³ Though an action may be maintained against the sheriff for any act of extortion, whether done by himself or by his deputy, yet no indictment will lie against him for the taking illegal fees by a deputy.⁴ The taxation of a bill of costs is a judicial act, and such taxation is conclusive, and cannot be attacked in a collateral action, whether the charges allowed by the taxing officer are authorized by the fee bill or not.⁵

§ 1143. A ministerial officer whose fees for any particular service are fixed by law, cannot maintain an action on a promise of extra compensation for extra services in the execution of process, though such service be beyond what could be legally required of him.⁶

§ 1144. But where no fee is prescribed by law, for any service which the officer is required to perform, and he is not in terms required to perform such duty without compensation, he is entitled to ask and receive a reasonable compensation for his services.⁷ And where a reward is offered for the apprehension of one who has perpetrated a crime; or for the discovery of stolen or embezzled goods, it is not against the policy of the law or incompatible with the duties of a public officer, who discovers the criminal or the property, without process in his hands for that purpose, that he should share in the reward.⁸ And where a reward was offered for the arrest of a criminal and the sheriff, with a requisition for that purpose proceeded to another state and there arrested the accused, it was held that he might receive the reward; and that the describing him in the requisition as sheriff did not alter the case. He must be deemed to have made the arrest as a private citizen and not as sheriff.⁹

¹ 3 R. S. 931, § 7.

² 3 R. S. 931, § 8.

³ 3 R. S. 1052, § 28; 2 Denio 26, *Supervisors of Onondaga Co. v. Briggs*.

⁴ Ante, § 848; 7 John. 35, *McIntyre v. Trumbull*.

⁵ 2 Denio 26, *Supervisors of Onondaga Co. v. Briggs*.

⁶ 15 Wend. 44, *Hatch v. Mann*; 9 Wend. 262, *Hatch v. Mann*; 18 John. 242, *Bright v. The Supervisors of Che-*

nango; 2 Cow. 533, *Doubleday v. Supervisors of Broome Co*; R. M. Charlton (Ga.) R 23 *Forbes v. Morel*.

⁷ 9 John. 328, *Smith v. Birdsall*; 12 Wend. 257, *The People ex rel. Hilton v. Supervisors of Albany*; 2 Denio 26, *The Supervisors of Onondaga Co. v. Briggs*; 2 Sandf. 742, *Gallagher v. Egan*.

⁸ 2 Ed. Ch. 95, *City Bank v. Bangs*.

⁹ 53 Barb. 387, *Gregg v. Pierce*.

CHAPTER II.

FEES OF SHERIFFS. ^a

1. FOR SERVICES RENDERED THE STATE.

§ 1145. The Revised Statutes provide that whenever a sheriff shall be required by any statutory provision, to perform any service in behalf of the people of this state, and for their benefit, which shall not be made chargeable by law to his county, or to some officer or other person, his account for such services, shall be audited by the comptroller, and be paid out of the treasury.¹

§ 1146. The treasurer of this state shall pay, on the warrant of the comptroller, to the sheriffs of the several counties in this state, such sum or sums of money as now are, or hereafter may be due to them respectively, for their services and expenses in transporting convicts to either of the state prisons.² Whenever any sheriff shall produce to the comptroller a statement of his account for such services and expenses, certified by the clerk or agent of such prison to be correct, and that there are no funds at said prisons applicable to the payment thereof, it shall be the duty of the comptroller to draw his warrant on the treasurer in favor of such sheriff for the amount of his account.³ And it is farther provided, that the account of any sheriff for trans-

¹ 1 R. S. 878, § 171.

² 1 R. S. 510, § 25.

³ 1 R. S. 510, § 26.

Ala.—R. C. §§ 646, 3518, 3522-3527, 3320, 4337-4340; Laws 1868, p. 14.
 Ark.—Dig. 1858, p. 524; Laws 1867, p. 288.
 Cal.—Dig. 1860, pp. 438, 443, 450, 983; Laws 1861, pp. 106, 477; Laws 1867-8, p. 440.
 Conn.—Rev. 1866, pp. 652, 654, 657, 659.
 Del.—R. S. 1853, p. 445; Laws 1865, p. 660.
 Fa.—Dig. 1847, pp. 431, 436; Laws 1859, p. 18; Laws 1866, p. 11.
 Ga.—Code, § 700.
 Ill.—Laws 1865, p. 69.
 Ind.—R. S. 1852, p. 284; Laws 1853, p. 64; Laws 1855, p. 183; Laws 1865, p. 70.
 Ia.—Rev. 1860, p. 710.
 Kan.—Gen. St. 1868, p. 476.
 Ky.—1 R. S. 521; 3 R. S. 279, 468.
 La.—R. S. 137.
 Me.—R. S. 654; Laws 1867, p. 64.
 Md.—1 Code 299.
 Mass.—St. 1860, p. 785; Sup. pp. 31, 131, 163, 335, 357, 460.

Mich.—St. 1857, pp. 1482, 1494; Laws 1867, p. 181.
 Minn.—Rev. 1866, p. 505.
 Miss.—Rev. Code 145; Laws 1867, p. 702.
 Mo.—Gen. St. 1865, p. 177.
 Neb.—R. S. 161.
 N. H.—Gen. St. 1867, pp. 545, 549.
 N. J.—Dig. 1855, p. 268.
 N. C.—Rev. Code 542; Laws 1869, p. 664.
 O.—1 R. S. 631; Sup. R. S. 364.
 On.—Gen. L. 735, 738.
 Penn.—Dig. 1861, p. 457; Laws 1868, pp. 3, 52.
 R. I.—R. S. 589; Pub. L. p. 89.
 S. C.—Laws 1870, p. 400.
 Tenn.—Code p. 818.
 Tex.—Laws 1866, p. 232.
 Va.—Code 1849, p. 697, 703.
 Vt.—Gen. St. 1863, p. 733; Laws 1865, p. 42; Laws 1868, p. 48.
 Wis.—R. S. 1858, 164, 249, 747, 761, 773, 1011; Laws 1863, p. 204; Laws 1866, p. 56; Laws 1867, p. 18.

porting convicts to the state prisons, certified and attested as provided by law,¹ shall be audited by the comptroller and paid out of the treasury, unless otherwise provided.² And for conveying juvenile delinquents to any penitentiary, such fees as are allowed by law for conveying convicts to the state prisons, to be paid by the state treasurer.³

§ 1147. The fees and compensation of sheriffs for conveying convicts to the state prisons, have been fixed as follows: For conveying a single convict to the state prison, for each mile from the county prison from which such convict shall be conveyed,

					\$0 35
For conveying two convicts for each mile as aforesaid,					45
For	"	three	"	"	50
For	"	four	"	"	55
For	"	five	"	"	60

And for all additional convicts, such reasonable allowance as the comptroller may think just, which said allowance, with one dollar per day for the maintenance of each convict whilst on the way to the state prison, but not exceeding one dollar for every thirty miles travel, shall be in full of all charges and expenses in the premises.⁴

§ 1148. All the convicts who shall be sentenced to imprisonment in the same state prison, or to the same house of refuge, at one session of a criminal court, shall be transported at the same time, unless said court shall expressly direct otherwise.⁵

§ 1149. A reasonable compensation for making return of convictions to the secretary of state.

§ 1150. When the governor of this state, in the exercise of the authority conferred by the constitution of the United States, or by the laws of this state, shall demand from the governor of any state or territory in the United States, or from the executive authority of any foreign government, any fugitive from justice, the accounts of the persons employed by him for that purpose, for their services, shall be audited by the comptroller and paid out of the treasury.⁶ In such cases, such persons are usually allowed their actual necessary expenses in executing the requisition of the governor, and a reasonable per diem compensation. When a fugitive from justice from another state is arrested within this state, all costs and expenses in the apprehending, securing and transmitting such fugitive to the state or territory making demand of him, shall be paid by such state or territory.⁷

¹ Ante, 268.

² 3 R. S. 1051, § 19.

³ 3 R. S. 988, § 27.

⁴ 3 R. S. 1050, § 17.

⁵ 3 R. S. 1051, § 20.

⁶ 3 R. S. 1043, § 52; 53 Barb. 387, *Gregg v. Pierce*.

⁷ Ante, § 90.

§ 1151. For executing any warrant to remove any person from lands belonging to the people of this state, or to Indians, such sum as the comptroller shall audit and certify to be a reasonable compensation;¹ to be paid out of the treasury.

§ 1152. For serving the comptroller's notification upon debtors of the state, such amount as may be audited by the comptroller and which shall be paid out of the treasury.²

§ 1153. For serving subpoenas of the canal board, canal commissioners, or canal appraisers, they shall be paid by the canal commissioners or commissioners of the canal fund, such sum therefor as may be deemed just and reasonable.³

2. FOR SERVICES RENDERED THE COUNTY

§ 1154. It is declared that all fees and accounts of magistrates and other officers for criminal proceedings, including cases of vagrancy, shall be paid by the several towns or cities wherein the offence shall have been committed; and all accounts rendered for such proceedings shall state where such offence was committed, and the board of supervisors shall assess such fees and accounts upon the several towns or cities designated by such accounts; but when any person shall be bound over to the oyer and terminer, or court of sessions, or committed to jail to await a trial in either of said courts, the costs of the proceedings had before the single magistrate shall be chargeable upon the towns or cities as aforesaid, and the costs of the proceedings had after the person shall have been so bound over or committed, shall be chargeable to the county; but nothing herein contained shall apply to cases of felonies, nor where the proceedings or trial for the offence shall be had before any court of oyer and terminer or court of sessions of the county.⁴

§ 1155. All town and county officers, and all other persons who may present to the board of supervisors, accounts for their services, to be audited and allowed, shall, before any such account or claim shall be passed upon or allowed, exhibit a just and true statement in writing, of the nature of the service performed by them.⁵

§ 1156. In all cases in which a specific compensation for any service is not provided by law, the officer or person presenting an account therefor, shall also exhibit in writing, a just and true statement of the time actually and necessarily devoted to the performance of such services.⁶

¹ 3 R. S. 926, § 33; 1 R. S. 550, § 68.

² Ante, § 1145.

³ Ante, §§ 199, 200.

⁴ 1 R. S. 855, § 39.

⁵ 1 R. S. 902, § 1.

⁶ 1 R. S. 902, § 2.

§ 1157. All officers, or other persons, who may be by law authorized to serve any warrant, summons or any other precept of any court in Oneida county, and whose accounts for such services are by law required to be audited by the board of supervisors, shall state, in rendering such accounts, the name of the officer or court issuing the process, the names of the persons on whom, and also the time and place where such service was made. No account for such services hereafter rendered shall be audited, unless made out in compliance with the requirement of the act.¹

§ 1158. The fees of justices, constables and sheriffs of Herkimer county, in cases of complaint and prosecution for false pretences, shall not be chargeable to the town or county until after conviction and a record thereof is duly filed. The party complaining shall be liable for said fees. After conviction, the amount of fees so paid shall be a valid charge against the county.²

§ 1159. The following are county charges. Where no fee is given, the compensation is to be fixed by the board of supervisors.

For attendance upon the drawing of a grand jury.³

For preparing statements of prisoners in jail for the district attorney.

For preparing calendar of prisoners in jail for courts of oyer and terminer and sessions.⁴

For summoning each grand jury,⁵

\$10 00

In respect to the fees of the sheriff of the city and county of New York, for the summoning of juries, it is provided that it shall be the duty of the clerk of every court for which a panel of grand or petit jurors shall be summoned by the sheriff of the city and county of New York, to notify the supervisors of every case in which less than a majority of the persons named in the panel shall be returned as personally served, and the supervisors are prohibited from allowing or paying any fees or charges to the sheriff for serving any of the persons named in a panel in relation to which they shall be so notified, or for making any return thereto. Any clerk omitting to notify the supervisors as required by this section, shall be liable to a penalty of one hundred dollars for every such omission,⁶ to be recovered by any person suing therefor.

The sheriff of Oswego county, for summoning grand and petit juries for the Recorder's court of the city of Oswego,⁷ \$2 00

¹ 4 R. S. 587, § 3.

² 4 R. S. 588, § 1.

³ 1 R. S. 902, § 3; 12 Wend. 257, *The People ex rel. Hilton v. Supervisors of Albany*; Ante, § 161.

⁴ 3 R. S. 1066, § 25; 2 R. S. 904, § 7.

⁵ 3 R. S. 1050, § 17.

⁶ 3 R. S. 701, § 40.

⁷ 3 R. S. 346 § 176.

For returning the precept for the oyer and terminer,	12½
For returning the jury lists, each,	12½
For summoning constables to attend the supreme court, or any other court, for each constable, ¹	50
The sheriff of Rensselaer county, for each days attendance upon the courts held in his county,	3 00
But no deputy sheriff is to be summoned, nor paid for such service. ²	
The sheriff of Rensselaer county for services as jailer receiving and discharging prisoners, and for statements and certificates of convicts, in lieu of all other fees or compensation therefor, annually, ³	500 00
And for conveying a single convict to the house of refuge in the city of New York, including all expenses,	25 00
And for every additional convict, ⁴	5 00
The sheriff of Kings county for each days attendance on the city court of Brooklyn, the same as constables. ⁵	

The expenses of sheriffs necessarily incurred in the support of persons charged with or convicted of crimes, and committed therefor to the several jails of the county, to be determined and allowed by the board of supervisors.⁶

The allowance for conveying juvenile delinquents to the house of refuge, and lunatics to the insane asylum, to be fixed and allowed by the board of supervisors.⁷

For every prisoner committed to prison, ⁸	37½
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For every prisoner discharged from prison,	37½
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The sheriff of the city and county of New York for receiving and committing a prisoner when committed by a police justice, such sum as the board of supervisors may determine, not to exceed fifty cents on each commitment.⁹

The sheriff of Albany county, for his services as jailer, receiving and discharging prisoners, annually, the sum of nine hundred dollars.¹⁰

For conveying convicts sentenced at any court in Albany or Onondaga counties, to the penitentiaries of said counties respectively, one half the fees allowed by law for transporting prisoners to the state prisons or houses of refuge, to be paid by the county sending them, except where such service is rendered by a constable or officer in

¹ 3 R. S. 924, § 33.

² Laws 1866, Ch. 605.

³ 3 R. S. 927, § 36.

⁴ 3 R. S. 927, § 36.

⁵ 3 R. S. 350, § 14.

⁶ 1 R. S. 902, § 3, sub. 6.

⁷ 4 R. S. 7, § 1.

⁸ 1 R. S. 902, § 3; 3 R. S. 1050, § 17.

⁹ Laws 1869, Ch. 569, § 4.

¹⁰ 4 R. S. 593, § 1.

attendance on any court of oyer and terminer, and general sessions for the city and county of Albany, or the city of Syracuse, or the county of Onondaga, who is paid by the day for such attendance; or by any police constable of Syracuse; in which case only the actual expenses incurred shall be paid by the superintendents of such penitentiaries.¹ When the convict is sent to either of said penitentiaries from any county other than the counties in which such penitentiaries are, the officer carrying them shall be paid by the county from which they are sent, such fees for said conveyance, as the board of supervisors of said county shall direct.²

For services which may be rendered by a constable, the same fees as are allowed by law, for such services to a constable.³

Constables receive for the following services:

For serving a warrant (when the arrest is made,*)	0 75
For every mile traveled, going and returning,	10
For taking a defendant into custody on a mittimus, †	25
For every mile traveled in taking the prisoner to jail, going and returning,	10

For taking charge of a jury during their deliberations, 50

But to entitle the sheriff to the travel fees mentioned, he must make the affidavit required by constables in such cases.⁵

In Albany county no traveling fee is allowed any officer on criminal process, unless the distance is over two miles.⁶

Serving a subpoena, for each witness, 12½

For every mile, going and returning necessarily traveled to make service of the same.⁷ 06

But no board of supervisors shall allow any charge for issuing or serving any subpoena in any criminal case or proceeding issued or served on behalf of the defendant.⁸ When a subpoena for witnesses in criminal cases or complaints, containing one or more names, shall be served by a constable or other officer, such officer shall be allowed for mileage only for the distance going and returning, actually traveled to make such service upon all the witnesses in such case of complaint, and not separate mileage for each witness, unless the board of supervisors auditing the accounts for such service shall deem it equitable to make a further allowance.⁹

No travel fees shall be allowed for traveling to subpoena a witness

¹ Laws 1847, Ch. 183, § 1; Laws 1850, Ch. 338, § 1.

² Laws 1847, Ch. 183, § 7; Laws 1850, Ch. 338, § 7; Laws 1855, Chs. 111 & 402, § 1.

³ 3 R. S. 926, § 33.

⁴ 1 Denio 658, Ex parte Wyles.

⁵ Laws 1869, Ch. 830, §§ 7, 8, 9.

⁶ Laws 1844, Ch. 80, § 4.

⁷ 3 R. S. 1046, § 4.

⁸ 3 R. S. 998, § 40.

⁹ 3 R. S. 1046, § 4.

beyond the limits of the county in which the subpoena was issued, or of an adjoining county, unless the board auditing the account shall be satisfied by proof that such witness could not be subpoenaed without additional travel; nor shall any travel fees for subpoenaing witnesses be allowed, except such as the board auditing the account shall be satisfied were indispensably necessary.¹ Such proof is usually the certificate of the district attorney or magistrate, of the necessity of sending the officer beyond the limits of the county, or of the adjoining county.

The board of supervisors may allow such farther compensation for the service of process, and the expenses and trouble attending the same, as they shall deem reasonable.²

The moneys necessarily expended by sheriffs in the execution of the duties of their office, in cases in which no specific compensation for such services is provided by law.³

Accounts of sheriffs for paying the fees of clerks of counties, for drawing grand juries, for attending the drawing of grand juries, and and for summoning constables to attend courts.⁴

For other services in criminal cases for which no compensation is specifically provided, such sum as the board of supervisors of the county shall allow.⁵

For giving notice of any general or special election, to the supervisors or assessors of the different towns and wards of his county, for each ward and town, one dollar and the expense of publishing such notices as are required by law.⁶

3. FEES FOR SUMMONING JURORS.

§ 1160. For summoning each grand jury,⁷ \$10 00

For summoning grand and petit jurors for the Recorder's court of Oswego,⁸ 2 00

For summoning the jury to attend any court, for each cause noticed for trial at each court, or placed on the calendar thereof for trial, to be paid by the party who put it on the calendar,⁹

50

Summoning a jury upon a writ of inquiry, or in any case where it shall become necessary to try the title to any per-

¹ 1 R. S. 856, § 40.

² 3 R. S. 1047, § 4.

³ 1 R. S. 902, § 3.

⁴ 1 R. S. 903, § 3; 18 John. 242, *Bright v. Supervisors of Chenango Co.*; 2 Cow. 331, *Mallory v. Supervisors of Cortland Co.*

⁵ 12 Wend. 287, *The People ex rel. Hilton v. Supervisors of Albany.*

⁶ 3 R. S. 926, § 33.

⁷ 3 R. S. 1050, § 17.

⁸ 3 R. S. 346, § 176.

⁹ 3 R. S. 925, § 33; 6 John. 125, *Woods v. Gibson.*

sonal property, attending such jury, and making and returning the inquisition,¹ \$1 50

Summoning a jury pursuant to any precept or summons of any officer, in any special proceeding,¹ 1 00

Attending such jury when required,¹ 50

For summoning a jury in the case of an absconding or insolvent debtor to be paid by the creditors,² 1 12½

For summoning a jury in a plank road case, for each mile travelled,³ 06

4. FEES IN CIVIL ACTIONS.

§ 1161. The plaintiff in an action, and his attorney, are each liable to the sheriff for his fees in serving or executing process, or for any official services rendered in the cause.⁴ But if the sheriff elects to look to the attorney exclusively, and gives him the whole credit, he cannot afterwards look to the party.⁵ When, however, a party is permitted by the court to prosecute, as a poor person, the sheriff or other person who is required to perform any service therein shall do their whole duty therein without taking any reward for the same.⁶

It has been seen that where the sheriff is required by law to perform any official duty, for which no fee is given, and he is not required to perform the same without pay, he is entitled to receive a reasonable compensation therefor.⁷

The following fees are given by statute :⁸

For serving a *capias ad respondendum*, writ of replevin, summons, or any other process, by which a suit shall be commenced in a court of law, citation, *scire facias*, or declaration, on each defendant,⁹ when there shall have been no process previous thereto, \$0 50

Most of the processes mentioned, have become obsolete, but under the foregoing provisions the sheriff would be entitled to the same fees for serving the substituted process, as those named. Thus he would be entitled to the same fees for executing a judge's order for the arrest of a defendant as under the foregoing statute he was entitled to for the service of a *capias ad respondendum*; and for executing an order for the delivery of personal property, the same fees as on executing the former writ of replevin.

For traveling in making any such service, six cents per mile, for

¹ 3 R. S. 925, § 33.

² 3 R. S. 111, § 18.

³ 2 R. S. 496, § 82.

⁴ 5 John. 252, *Adams v. Hopkins*; 4 Wend. 474, *Jackson ex d. Anderson v. Anderson*.

⁵ 9 John. 114, *Osterhout v. Day*.

⁶ 3 R. S. 745, § 3.

⁷ Ante, § 1144.

⁸ 3 R. S. 924, § 33.

⁹ 1 Cow. 231, *Griswold v. Walton*.

going only, to be computed in all cases from the court house of the county; and if there be two or more court houses, to be computed from that which shall be nearest to the place where the service shall have been made; except that in the county of Oneida, such travel shall be computed from the court house in Whitestown.¹ The law remains unchanged though there is no longer a court house in Whitestown.

For serving a notice of the object of suit with each summons,²

37½

For returning any writ, summons, complaint,³ &c.,

12½

For taking a bond of a plaintiff in replevin, or taking a bond on the arrest of a defendant, or taking his indorsement of appearance, or for taking a bond in any other case where he is authorized to take the same, for which no fee is allowed by statute,

37½

The same remark will apply to the fee given for the taking any bond, as to that in respect to the service of process. The sheriff would be entitled to the same fees on taking an undertaking in any case where the same is authorized by the Code, as for a bond.

For a certified copy of such bond or undertaking,

25

For a copy of every summons, scire facias, or declaration served by him, when made by the sheriff, if in the supreme court, for every folio of one hundred words,

12½

If in the county court,

09

For a copy of every other writ when demanded or required by law (but no such charge can be made against the defendant,⁴)

19

5. FEES ON EXECUTIONS.

§ 1162. The fees allowed for the service of an execution, and for advertising, shall be collected by virtue of such execution, in the same manner as the sum therein directed to be levied.⁴ But the sheriff has no right to sell the defendant's property, for the purpose of collecting his fees, after notice that the judgment has been settled, but he must look to the attorney or the party, unless there be collusion between the parties, and the plaintiff and his attorney are irresponsible.⁵ When there are several executions in the hands of the sheriff at the same time, against the same party, there shall be but one advertising fee charged, and he shall elect on which to charge it. But he is entitled to travel fees and poundage on all executions in his hands on which he

¹ 3 R. S. 924, § 33.

² 2 Sandf. 742, *Gallagher v. Egan*.

³ 3 R. S. 738, § 96.

⁴ 3 R. S. 924, § 33.

⁵ 4 Wend. 479, *Jackson ex d. Anderson v. Anderson*.

receives money to apply thereon.¹ And if executions issue to several counties, and a levy is made on each, and the money collected in one county, the plaintiff is liable to the sheriff of the other counties for their fees on the executions in their hands, on which they have made a levy. They cannot collect such fees out of the defendant after notice, but they must look to the plaintiff or his attorney.² So, if any execution is settled by payment, or the taking security after levy, the sheriff is entitled to his full fees, though the levy would not pay the amount of the execution, or the property is covered by previous liens to an amount exceeding its value.³ And so too, he is entitled to his fees and poundage where a levy is made, though the execution is irregular and is afterwards set aside; and if a plaintiff direct a levy upon specific property and afterwards finds it not liable to the execution, and thereupon directs the levy to be released, he is liable to the sheriff for his fees. On the *capias ad satisfaciendum*, the sheriff is entitled to his fees for arresting the defendant;⁴ and this too, though the whole proceeding is irregular and a new judgment is obtained, and another execution is issued and the sheriff paid on that.⁵ But it is otherwise if the party is exempt from arrest.⁶ And if the sheriff arrests him on one writ, and detains him on another, he is entitled to his fees on both. If the sheriff does anything beyond his official duty, at the instance of the defendant in the execution, he is entitled to remuneration beyond his poundage, by the defendant; but not if it is any act prohibited by law, or a violation of his duty. Nor can he charge the expense of selling the goods levied on, at auction, because he is bound to sell them himself. Yet, if an auctioneer be employed at the request of the plaintiff or the defendant, or any other party interested in having the property bring the largest price, such party must pay the expense.⁷

§ 1163. Upon the settlement of an execution, by a defendant, or upon settling any suit or demand, the sheriff or attorney claiming any fees which shall not have been taxed, shall upon being required by the defendant, and on his paying the expense thereof, have his fees taxed by some proper officer of the court, in which the action may be pending, or for which the execution shall have been issued.⁸ No sheriff or attorney shall collect any fees after having been required as afore-

¹ 3 Cow. 383, *Knickerbocker v. Ship-herd*.

² 9 Wend. 435, *Bolton v. Lawrence*; *Graham's Pr.* 363.

³ 1 Caines 192, *Hildreth v. Ellice*; 9 Wend. 435, *Bolton v. Lawrence*; 17 Wend. 14, *Parsons v. Bowdoin*; 13

John. 378, *Scott v. Shaw*; 5 *John* 252, *Adams v. Hopkins*.

⁴ 5 *John.* 252, *Adams v. Hopkins*.

⁵ 13 *John.* 378, *Scott v. Shaw*.

⁶ 10 *John.* 93, *Wragg v. Swart*.

⁷ *Watson*, 80; *Clitty on Contracts*, 583; 2 *Term. R.* 157, *Woodgate v. Knatchbull*.

⁸ 3 *R. S.* 932, § 1.

said, to have the same taxed, without such taxation having been made.¹ Where an officer's fees have been regularly taxed, it is an answer to an action for treble damages under the statute for extortion,² as well as to an action to recover back the money.³

§ 1164. The following fees have been prescribed by statute upon the service of executions against the person or property :⁴

For serving an attachment for the payment of money, or an execution for the collection of money, or a warrant for the same purpose, issued by the comptroller, or by any county treasurer, for collecting the sum of two hundred and fifty dollars, or less, per dollar, 02½

And for every dollar collected, more than two hundred and fifty dollars,⁵ 01¼

For mileage on every execution, for going only, to be computed from the court house, per mile,⁶ 06

The sheriff is entitled to the same fees as upon executions in civil cases, upon executing process of the district attorney, for the collection of fines imposed by courts upon jurors and others.⁷

Advertising goods or chattels, lands or tenements for sale, on any execution, 2 00

And if the execution be stayed or settled, after advertising and before sale, 1 00

The fees allowed by law, (being not more than seventy-five cents per folio for the first insertion, and thirty cents per folio for each subsequent insertion after the first),⁸ and paid by such sheriff to any printer for publishing an advertisement of the sale of real estate, for not more than six weeks ; and for continuing such advertisement more than six weeks, or for publishing the postponement of any such sale, the expense of such continuance or postponement shall be paid by the party requiring the same.⁹

Where proceedings are stayed upon an execution until the decision of a non enumerated motion, and the motion is denied, and the advertisement has been continued in the meantime, the party against whom the process issued is liable to pay the expense of the advertisement ; but he is not so liable where the proceedings are stayed for the purpose of enabling the party to move for a new trial on a case made.¹⁰

¹ 3 R. S. 932, §§ 1, 2.

² Ante § 1142.

³ 2 Denio 26, *The Supervisors of Onondaga Co. v. Briggs* ; 2 Hill 135, *The Supervisors of Onondaga Co. v. Briggs*.

⁴ 3 R. S. 924, § 33.

⁵ 1 Har. (N. J.) 21 ; *Sinnickson v. Gale* ;

10 Mo. 352, *Gordon v. Maupin* ; *Id.* 456, *Irvin v. Milburn*.

⁶ 3 R. S. 924, § 33.

⁷ 3 R. S. 787, § 23.

⁸ 3 R. S. 929, § 45 ; 4 R. S. 9 § 1.

⁹ 6 Wend. 535, *Camp v. Garr*.

¹⁰ 18 Wend. 590, *Smith v. Martin*.

For every certificate on the sale of real estate or on the redemption thereof,¹ for each folio, 25

For two copies of the certificate of sale, and one of the certificate of redemption, for each folio, 12½

The clerk's fees on filing certificate of sale, 06

Clerk's fees for recording certificate.²

The fees before mentioned for the service of an execution, and for advertising thereof, and clerk's fees for filing and recording the certificate of sale, shall be collected by virtue of such execution, in the same manner as the sum therein directed to be levied. But when there shall be several executions against the defendant, at the time of advertising his property, in the hands of the same sheriff, there shall be but one advertising fee charged on the whole, and the sheriff shall elect on which execution he will receive the same.

The fee for the certificate of redemption must be paid by the party for whose benefit the same is made.

For a deed on the sale, to be paid by the grantee, 1 00

For serving an execution issued by the county clerk, upon the judgment of a justice,³ or the warrant of the county treasurer for the collection of taxes upon rents reserved,³ the same fees as are allowed to constables on justices' executions, to wit:

For serving an execution⁴ for every dollar collected, to the amount of fifty dollars, 05

For every dollar collected over fifty dollars, 02½

For every mile, going only, more than one mile, to be computed from the place of abode of the defendant, or where he shall be found, to where the execution or warrant is returnable, each mile, 06

In addition to the fees now allowed to sheriffs on executions against property in civil actions, they shall be entitled to demand and receive on such executions the sum of fifty cents for receiving and entering the same in their books, searching for property and paying the postage on the return of the said execution, if such return be made by mail, which sum shall be a charge against, and be collected of the person by whom the said execution was issued, except when he is a county clerk, or of the person in whose favor the judgment was rendered.⁵ The said sum of fifty cents, in the case of judgments hereafter recovered, shall be one of the disbursements to be included in the bill of costs, fixed in favor of the party entitled thereto. In cases

¹ 3 R. S. 656, 86.

² 3 R. S. 651, 58.

³ 1 R. S. 941, 133.

⁴ 3 R. S. 452, § 150.

⁵ 3 R. S. 626, § 34.

where judgment has been already obtained, the said sum shall be collected by the sheriff from the defendant in the execution, in the same manner as his other fees are now collected.¹

For returning every execution, to be paid by the plaintiff also,

12½

The foregoing fees, on receiving and returning executions, are to be collected of the plaintiff or his attorney, whether anything is made on the execution or not.

For copy of execution paid to, or collected by the sheriff, with his indorsement of satisfaction thereon, to be paid by the party demanding it.²

25

On the county treasurer's warrant against a delinquent collector, the sheriff shall retain out of the moneys collected the same fees that the collector would have been entitled to retain.³

§ 1165. On the sale of premises under a decree of foreclosure, or in partition, the sheriff shall receive his disbursements for printer's fees. He shall also be entitled to receive the same fees as upon sales by virtue of an execution, but such fees shall in no case exceed the sum of ten dollars. If the amount bid on any such sale, or any part of such amount, shall be credited on the decree of sale, or be bid by the person or party in whose favor the decree shall be made, the fees of the sheriff shall be estimated upon the surplus, over and above the amount so credited or bid by such person or party; but if the fees on the whole sum bid on such sale would amount to more than five dollars, in case no part thereof was so credited or bid by such person or party, the sheriff shall be entitled to five dollars, if the fees on the sum actually paid would not amount to that sum.⁴

§ 1166. In the city and county of New York, all sales of real estate under the decree or judgment of any court of record (except sales in cases of partition, and where the sheriff of such county is a party) shall be made by the sheriff of said city and county; and in cases of foreclosure he shall be entitled to receive,

For receiving order of sale and posting notices,	10 00
Attending sale,	10 00
Drawing deed,	5 00
Attending and adjourning sale at request of plaintiff or order of the court,	3 00
But no more than three such adjournments shall be charged.	
For making report of sale	5 00
For paying over surplus moneys,	3 00

¹ 3 R. S. 926, § 35.

² 4 R. S. 576, § 1.

³ 1 R. S. 923, § 28; 26 Barb. 90, Sup. of Livingston Co. v McCartney.

⁴ 3 R. S. 291, § 49.

And all disbursements allowed by law for printer's fees, taking acknowledgments, administering oaths and internal revenue stamps affixed to conveyances executed and delivered by him and all auctioneer's fees actually paid by him, but not to exceed for such auctioneer's fees twelve dollars for each parcel separately sold, which auctioneer's fees shall be paid by the purchaser of the parcel in addition to the amount bid by him therefor.¹

§ 1167. Serving a writ of possession or of restitution; putting any person entitled, into possession of premises, and removing the tenant, \$1 25
 And traveling fees, going only, each mile, 06
 Returning the writ, 12½
 If there is a fi. fa. for costs, as a part of the writ, the same fees as on executions in other cases.

§ 1168. For every prisoner committed to prison, for receiving, 25
 For discharging every prisoner committed, 25
 To be paid by the plaintiff in the process.²

But the sheriff is not entitled to any fee for discharging a prisoner when he takes a bond for the limits, for it is not a discharge within the meaning of the statute.³

Taking a bond for the liberties of the jail. 37½

Where the prisoner is supported by the sheriff while in jail, he is entitled to a reasonable compensation therefor. The restrictions upon the sheriff against extortion in such case, have been hereinbefore pointed out.⁴

When any prisoner shall be committed to jail by virtue of any civil process issued by any court of record, instituted under the authority of the United States, the sheriff may receive to his own use, such sums of money as shall be payable by the United States, for the use of said jails.⁵

Sheriffs are likewise required to receive into jail prisoners committed by the United States on criminal process, the United States supporting such prisoners. Nothing is declared in the statute as to who shall be entitled to the payment made therefor, but it is conceived that under the foregoing provisions, the sheriff will be entitled to receive any fees therefor, the United States is required to pay.

§ 1169. Each officer to whom a writ for the collection of military

¹ Laws 1869, Ch. 567, §§ 1, 2.

² 3 R. S. 926, § 33.

³ 2 Wend. 602, *Merchant v. Mason*.

⁴ Ante, § 579, &c.

⁵ 3 R. S. 743, § 121.

finer may be directed, shall be entitled to the same fees, and be subject to the same penalties for any neglect, as are allowed and provided for on executions issued out of justices' courts.¹

For all other services and commitments under the said law, the sheriff, jailer, and constables executing the same, shall be entitled to the like fees as for similar services in civil cases.²

6. FEES ON ATTACHMENTS AGAINST FOREIGN CORPORATIONS, NON-RESIDENT OR ABSCONDING, OR CONCEALED DEBTORS ; AND AGAINST SHIPS.

§ 1170. For serving an attachment against the property of a debtor under the provisions of chapter five of the second part, or under the provisions of the eighth title of chapter eight of part third of the Revised Statutes ; or against foreign corporations, non resident or absconding, or concealed debtors, under the provisions of the Code,³

50

For returning the attachment,

12½

With such additional compensation for his trouble and expenses in taking possession of and preserving the property attached, as the officer issuing the warrant shall certify to be reasonable. And where the property so attached shall afterwards be sold by the sheriff, he shall be entitled to the same poundage on the sum collected, as if the sale had been made under an execution.

But the poundage shall only be computed on the amount actually collected on the execution, unless the matter is compromised, then the poundage shall be computed on the amount at which it is settled.⁴

For making and returning an inventory and appraisal, such compensation to the appraisers, not exceeding one dollar to each per day, for each day actually employed, as the officer issuing the attachment shall allow, and the same compensation for drafting and copying the inventory, as is allowed for drafts and copies to attorneys in the supreme court.

Such allowance is for drafting each folio,

25

For copying each folio,

12½

For selling any property so attached, and for advertising such sale. the same allowance as for sales on executions.

The costs and charges of the sheriff on an inquest of title, in the case of a non resident debtor, to be allowed by the officer issuing the warrant, shall be paid by the attaching creditor, if the title to the property is found in the claimant and if not then by such claimant.⁵

¹ Ante, § 760 ; Military Code, § 203, sub. 3.

⁴ Code, § 243.

² Ante, § 760 ; Military Code, § 203 sub. 4.

⁵ 3 R. S. 80, § 12 ; Code, § 233.

³ Ante, § 366, &c. ; 384, &c., Code § 227.

Fees on attachments against ships.	
For serving warrant,	\$1 00
For returning same,	1 00
Necessary expenses of keeping vessel not exceeding for each day the vessel has been held by him in custody,	2 50
The sheriff shall not be entitled to receive any other or greater sums than the above specified, for any service rendered by him on seizing a vessel, nor shall he be allowed the expense of custody upon more than one warrant at the same time. All costs, disbursements and fees shall be verified by affidavit and adjusted by the officer who issued the writ. ¹	

7. FEES ON WRITS OF HABEAS CORPUS AND CERTIORARI.

§ 1171. Bringing up a prisoner on habeas corpus, to testify or answer in any court,	1 50
For traveling each mile from the jail, ²	12½
For attending such court with such prisoner, per day, besides actual necessary expenses, ³	1 00
Making return to the writ,	12½
Copy of process to annex to return, for each folio,	12½
Return to writ of certiorari,	12½
Copy of process to annex to return, for each folio, ⁴	12½

8. FEES IN OTHER CASES.

1172 There is no fee prescribed for the execution of a warrant, under the non-imprisonment act, but the taxing officer usually allows the same compensation as is given in cases of habeas corpus.⁵

Executing an attachment	50
Travel fees for each mile,	06
Bond taken on the arrest,	37½
Return of writ, ⁶	12½

No fee is prescribed for the service of an attachment against a defaulting witness, or the like, where the party is arrested and brought into court. It is usual, however, for the court before whom the party in contempt is brought, to impose such fine as will be a reasonable compensation to the officer making the arrest. Usually there is allowed for serving the attachment,

	50
Return thereof,	12½
Travel fees from the place of arrest to to the court where the writ is returnable, for each mile,	12½

¹ 4 R. S. 654, § 14.² 7 Cow. 424, *The Utica Bank v. Kibbe*.³ 3 R. S. 925, § 33.⁴ 3 R. S. 894, § 99.⁵ Ante, § 1173.⁶ 3 Paige 85, *The People ex rel. Griffith v. Elmer*.

Attending before any officer with a prisoner, for the purpose of having him surrendered in exoneration of his bail; or attending to receive a prisoner so surrendered who was not committed at the time; and receiving any such prisoner into his custody in either case,¹

1 00

Attending a view, per day,

1 87½

Going and returning, per day,²

1 25

All sheriffs, coroners, and wreck masters, and all persons employed by them, and all other persons aiding and assisting in the recovery and preservation of wrecked property, shall be entitled to a reasonable allowance as salvage, for their services, and to all expenses incurred by them, in the performance of such service, out of the property saved; and the officer having the custody of such property shall detain the same, until such salvage and expenses shall be paid. But the whole salvage that shall be claimed in any case shall not exceed one half of the property or proceeds, on which such salvage shall be charged, and every agreement, order, or judgment, allowing a greater salvage shall be void.³

For holding an inquest to investigate the origin of fires, the actual and necessary expenses shall be fixed and paid in the same manner as the compensation and expenses of coroners are now provided for by law.⁴

For any services which may be rendered by a constable, the same fees as are allowed by law for such services to a constable.⁵

CHAPTER III.

FEES OF CORONERS. *

§ 1173. For all services rendered by coroners in actions or proceedings where they are authorized to act, whether as peace officers, in consequence of the sheriff being a party to any action or proceeding, or while they are discharging the duties of the office of sheriff during a vacancy in the office, they are allowed the same fees as sheriffs for similar services.⁶ They are also entitled to the same compen-

¹ 3 R. S. 925, § 33.

² 3 R. S. 925, § 33.

³ 2 R. S. 962, §§ 12, 13.

⁴ Ark.—Dig. 1858, p. 566; Laws 1867, p. 281, &c.

Cal.—Dig. 1830, pp. 112, 439, 444, 448, 481, 936; Laws 1861, p. 111; Laws 1861, p. 111; Laws 1865, p. 442.

Del.—R. S. 1852, p. 449.

Fa.—Dig. 1847, p. 436; Laws 1866, p. 11.

⁵ 2 R. S. 996, § 7.

⁶ 3 R. S. 926, § 33.

⁶ 3 R. S. 927, § 38.

Ga.—Code, 702.

Ind.—R. S. 1852, p. 290; Laws 1853, p. 71; Laws 1867, p. 125.

Ia.—Rev. 1860, p. 711.

Kan.—Gen. St. 1868, p. 480.

Ky.—1 R. S. 523.

La.—R. S. 132.

sation for their services in the case of wrecks, as sheriffs and wreck-masters.¹

For confining a sheriff in any house, on civil process, two dollars for each week, to be paid by such sheriff before he shall be entitled to be discharged from such confinement.²

§ 1174. The compensation to be paid to the coroners of the several cities and counties of this state, for holding any inquest in the cases authorized by law, shall be fixed, and together with all necessary incidental expenses, shall be audited and allowed by the board of supervisors of their respective counties, and paid in like manner as other county charges.³

§ 1175. The boards of supervisors of the respective counties sometimes allow a specific sum for all services rendered by a coroner upon an inquest in any given case; and sometimes an allowance is made for viewing the body, and in addition thereto the same fees as magistrates and sheriffs are entitled to receive for similar services, upon the inquest, or upon examination of the prisoner, as follows:

For viewing the body, the amount to be fixed by the board of supervisors.	
Precept for summoning the jury,	50
Summoning the jury and attending the same,	1 50
Swearing the jury,	25
Subpœna,	25
Subpœnaing each witness,	25
Travel fee in subpœnaing witnesses, for each mile traveled,	10
Swearing each witness,	10
Drawing inquisition, for each folio,	25
Engrossing to sign, each folio,	12½
Travel fees in returning inquisition to clerk's office, each mile,	10
Warrant for the arrest of one charged with crime,	25
Examination of accused, each day,	1 00
Every necessary adjournment,	25
Warrant of commitment,	25

¹ 2 R. S. 962, § 12, 13; Ante, § 1172.

² 3 R. S. 927, § 38.

³ 3 R. S. 1050, § 16.

Me.—R. S. 656.

Md.—1 Code, 293.

Mass.—St. 1860, p. 787; Sup. 168.

Mich.—St. 1857, p. 1485.

Minn.—Rev. 1866, p. 507.

Miss.—Rev. Code, 147.

Mo.—Gen. St. 1865, p. 179.

Neb.—R. S. 163.

N. H.—Gen. St. 1867, p. 550.

N. J.—Dig. 1855, p. 271.

N. C.—Rev. Code, 542; Laws 1869, p. 666.

O.—1 R. S. 639, &c.

On.—Gen. L. 736.

Penn.—Dig. 1861, p. 450.

R. I.—R. S. 589.

S. C.—Laws 1870, p. 399.

Tenn.—Code, p. 820.

Tex.—Laws 1866, p. 233.

Va.—Code 1849, p. 698.

Each recognizance of witness, 25

A reasonable compensation, and the actual expenses of digging up and burying again the body, on which an inquest is held.

Every other necessary expense incurred upon the inquest or examination of the person charged with the crime.

The coroners of the city and county of New York are entitled to the following fees and none other :

For viewing each body and holding an inquest thereon, 10 00

Summoning and swearing jury, 5 00

Making and filing inquest, 5 00

But the same is not to be audited by the board of supervisors of said county or paid, except upon the sworn accounts filed with said board and with the comptroller of said city.¹

Before auditing and allowing the accounts of coroners, the supervisors of the county shall require from each of them respectively, a statement in writing, containing an inventory of all money and other valuable things found with or upon all persons on whom inquests shall have been held, and the manner in which the same have been disposed of, verified by the oath or affirmation of the coroner making the same, that such statement is in all respects just and true, and that the money and other articles mentioned therein have been delivered to the treasurer of the county, or to the legal representatives of such person or persons.²

§ 1176. The said coroners shall be entitled to receive a reasonable compensation for making and rendering such statement, and for their trouble and services in the preservation and delivery of said effects and property, and all reasonable expenses incurred by them in relation thereto, to be audited by the board of supervisors, in addition to the fees or compensation to be allowed by them for holding an inquest.³

CHAPTER IV.

FEES OF CONSTABLES. ^a

§ 1177. As a general thing the same rules relative to the fees of sheriffs, apply to constables. These have been already stated.⁴ Like sheriffs, they are liable to indictment for extortion, or the exaction of

¹ Laws 1869, Ch. 565.

² 3 R. S. 1037, § 12.

^a Ala.—R. C. § 3521.

Ark.—Dig. 1858, p. 528; Laws 1867, p. 291.

Cal.—Dig. 1860, pp. 439, 444, 452, 960, Laws 1861, p. 108; Laws 1867-8, p. 445.

³ 3 R. S. 1038, § 13.

⁴ Ante, §§ 1141, &c.

Conn.—Rev. 1866, p. 652.

Del.—R. S. 1852, p. 464; Laws 1865, p. 660.

Fa.—Dig. 1847, p. 434; Laws 1859, p. 18; 1866, p. 11.

Ga.—Code, p. 703.

illegal fees; or for demanding fees before they have rendered the services, in cases where they are not so authorized to demand them. And so they are entitled to a reasonable compensation from the party requiring their service, when no fee is given therefor, and they are not in terms required to perform the act without compensation. And like sheriffs, too, they are entitled to poundage upon an execution, though they merely levy on the defendant's property, where the parties compromise before sale. But it is otherwise if the compromise is made before levy or arrest, for then they have done nothing officially.¹ So a constable is entitled to nothing where he has returned that the property is on hand for the want of buyers. To entitle him to his fees on an execution, he must levy the money, unless prevented by the plaintiff, or the operation of law.²

§ 1178. The board of supervisors of Herkimer county may prescribe such reasonable limits as they may deem sufficient for the aggregate amount of fees to be allowed to all constables for services in criminal cases chargeable to the towns and also said county in each town severally. But this is not to apply to those cases of felony in which extraordinary services shall be rendered by the written direction of the district attorney, given in advance of the services, and specifying as nearly as may be the particular services required. The constables of the towns in which the fees shall be so limited, shall keep an account of the services by them rendered in criminal cases, distinguishing between those chargeable to the town and county respectively, and if the legal fees shall exceed the prescribed limits, they shall be divided by the board of supervisors rateably among the officers rendering the services.³

§ 1179. In Richmond county no constable shall be entitled to receive any fee or compensation from any of the towns of the county, except the town in which he resides and for which he was elected, and his fees and compensation for town and county charges shall not

¹ 2 Cow. Tr. 502.

² 2 Cow. 421, *Pixley v. Butts*.

³ 4 R. S. 588, §§ 2, 3.

Ill.—Laws 1867, p. 1013.

Ind.—R. S. 1852, p. 288; Laws 1853, p. 69.

Ia.—Rev. 1860, p. 712.

Kan.—Gen. St. 1868, p. 482.

Ky.—1. R. S. 523.

La.—R. S. 131.

Me.—R. S. 657; Laws 1867, p. 64.

Md.—1 Code 292; Laws 1865, p. 102; Laws 1867, p. 567.

Mass.—St. 1860, p. 786.

Mich.—St. 1857, pp. 1485-1494.

Minn.—Rev. 1866, p. 507.

Miss.—Rev. Code 147.

Mo.—Gen. St. 1865, 179.

Neb.—R. S. 167.

N. H.—Gen. St. 1867, p. 550.

N. J.—Dig. 1858, pp. 272, 404; Laws 1863, p. 404.

N. C.—Rev. Code 542; Laws 1869, p. 667.

O.—1 R. S. 658; Sup. R. S. 367.

On.—Gen. L. 737.

Penn.—Dig. 1861, p. 468.

R. I.—R. S. 589.

S. C.—Laws 1870, p. 349.

Tenn.—Code, p. 821.

Tex.—Laws 1866, p. 234.

Vt.—Gen. St. 1863, p. 733; Laws 1865, p. 42.

Va.—Code 849, p. 698.

exceed three hundred dollars per year; and he shall not be entitled to any fee or compensation, unless the services for which the same is claimed shall have been performed within one year next preceding the time of the presentation of the claim to the board of supervisors or the board of town auditors.¹

§ 1180. Constables are allowed the following fees in criminal cases:

For serving a warrant,	75
For every mile traveled, going and returning,	10
For taking defendant into custody on mittimus,	25
For every mile travelled in taking the prisoner to jail, going and returning,	10
For taking charge of a jury during their deliberations,	50
For attending any court pursuant to a notice from the sheriff for that purpose for each day,	2 00
For every mile travelled, in going to and returning from such court. ²	05

And he is entitled to such compensation, if summoned for that purpose by the sheriff, though he should also be a deputy of the sheriff, and does not perform any of the duties of constable. It is sufficient that he is summoned and is ready to act.³ Such compensation is paid by the county treasurer, out of the fund provided for that purpose, on the certificate of the clerk of the court, who grants the same on the certificate of the sheriff, that such constable was summoned and has attended the court as constable, and the number of days he has so attended.

For transporting paupers to the county poor house, such compensation as the county superintendents of the poor may allow.⁴

§ 1181. The fees of constables in civil actions.

For serving a warrant or summons,	25
For a copy of every summons delivered on request, or left at the dwelling of the defendant, in his absence,	15
For serving an attachment,	75
For a copy thereof, and of inventory left at last residence of defendant,	75
For serving an execution for every dollar collected to the amount of fifty dollars,	05
For every dollar collected over fifty dollars,	02½
For every mile, going and returning, to serve a summons,	

¹ Laws 1866, Ch. 59, §§ 1, 2, 3.

² Laws 1866, Ch. 692, § 8; Laws 1869, Ch. 820, § 1.

³ 4 Cow. 146, *The People ex rel. Holley v. The Supervisors of Columbia Co.*

⁴ 2 R. S. 842, § 16, sub. 5.

warrant, attachment or execution, to be computed from the place of abode of the defendant, or where he shall be found, to the place where the precept is returnable,	10
For notifying a plaintiff of the service of a warrant,	25
And for going to the plaintiff's residence, or where he shall be found, for every mile traveled, going and returning,	10
For subpoenaing a witness, not exceeding four,	25
Summoning a jury,	75
Summoning a jury to assess damages in a highway case,	2 00
For serving affidavit, notice and summons in an action to recover possession of personal property,	50
For a copy of such affidavit, notice, and summons left with defendant, his agent, or at the last place of abode of the defendant,	50
For every mile traveled, going or returning, to serve such affidavit, to be computed from place where precept is returnable to the abode of defendant, or where he shall be found,	10
For taking charge of a jury during their deliberations, ¹	50
§ 1182. In special proceedings, constables are entitled to the following fees : ²	
Serving a summons,	25
Serving a warrant,	50
For arresting and committing any person pursuant to process,	1 00
For every mile traveled (going and returning) in each case.	10
Advertising and selling any property distrained for doing damage, or levying a fine, penalty, or sum, pursuant to any warrant, the same fees as are allowed for similar services on executions from justices' courts.	
Arresting and committing any person pursuant to process,	50
Mileage, for going only, each mile, ³	06
§ 1183. To entitle any constable or other officer to the increased or additional travel fees on criminal or civil process, such constable or officer shall show by affidavit that such travel was necessary on the process on which it is charged, and that no more miles are charged for than were actually and in good faith traveled on the execution of such process; and that such constable or officer at the time had no	

¹ Laws 1866, Ch. 692, § 6; Laws 1869, Ch. 820, § 1.

² Laws 1866, Ch. 632, § 7; Laws 1869, Ch. 820, § 1.

³ 3 R. S. 927, § 39.

other official or private business on such traveled route, and that the charge for going and returning was made only upon one process, which process shall be attached to or described in such affidavit; and such additional or increased travel fees shall not be allowed by any court or auditing board, unless such court or auditing board shall be satisfied that the miles charged were actually and necessarily traveled on the process named and on that process only.¹ ^a

UNITED STATES REVENUE STAMPS.

§ 1184. Under the internal revenue laws of the United States, the official bond of the sheriff, coroner, when he is required to give one, and constable, must have affixed and cancelled a one dollar revenue stamp. And all deeds executed by any sheriff must have the same stamp as deeds executed by private individuals; that is a stamp equal to fifty cents for each five hundred dollars, or fractional part of five hundred dollars, of the consideration. In practice the sheriff affixes such last mentioned stamps and charges the cost as a disbursement in his fees where the sale is in a foreclosure or partition case, and this is authorized by statute in sales in the city of New York.² On deeds on sales under execution, the person receiving the deed pays for the stamp as well as the deed.

¹ Laws 1869. Ch. 820, § 2.

² Ante, § 1166.

^a The provision of the act of 1869 creates an ambiguity as to the travel fees of a constable in case he has more than one process to serve at a time. The Revised Statutes gave six cents a mile, going only, in each case. Chapter 692 of the laws of 1866, increased these fees to ten cents a mile and repealed all laws inconsistent therewith. The act of 1869 substituted a new section in place of the one fixing constable's fees in the act of 1866, by which the travel fee was given both going and returning, but restricting

it, as stated, to cases where there was but one process and the officer had no other business on the route. There is then no law authorizing the payment of any travel fee where there is more than one process. Justices of the Peace it is understood, construe the law as giving double travel fees where the proper affidavit is made, and only a single fee where more than one process is served. This was doubtless the intention of the framer of the law, but he has failed so to express it.

FORMS FOR SHERIFFS.

No. 1.

OATH OF OFFICE OF SHERIFFS, CORONERS OR CONSTABLES.

See § 3.

I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the state of New York, and that I will faithfully discharge the duties of the office of sheriff, (under sheriff, deputy sheriff, or coroner) of the county of (or of constable of the town of) according to the best of my ability.

No. 2.

SHERIFF'S BOND.

See §§ 3, &c.

Know all men by these presents, that we are held and firmly bound unto the people of the state of New York, in the penal sum of ten thousand dollars; for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the day of January, 187

Whereas, the above bounden hath been elected to the office of sheriff of the county of at the general (or at a special) election held therein on the day of Now therefore, the condition of the above obligation is such, that if the said shall well and faithfully in all things perform and execute the office of sheriff of the said county of during his continuance 'n the said office, by virtue of the said election without fraud, deceit or oppression, then the above obligation to be void, or else to remain in full force.

(L. s.)

Sealed and delivered in the
presence of

(L. s.)

(L. s.)

When the bond is given by the sheriff of the city and county of New York, the penalty must be \$20,000. See § 3.

No. 3.

BOND GIVEN BY ONE APPOINTED TO FILL A VACANCY.

See § 12.

Insert the following in place of the recital in No. 2 :

Whereas the above bounden has been appointed by the governor of the state of New York, to execute the duties of the office of sheriff of the county of during the vacancy therein, caused by the death of late sheriff of said county, (or, caused by the resignation or removal from office of late sheriff of said county,) Now therefore the condition, &c.

No. 4.

RENEWED BOND.

See § 3.

Insert the following in place of the recital in No. 2 :

Whereas the said was duly elected sheriff of the county of at the general (or at a special) election held therein on the day of 18 ; and whereas, the said did duly enter upon the duties of the said office and hath continued in said office until this time, and now is the sheriff of said county ; Now therefore, the condition &c.

No. 5.

BOND UNDER MILITARY CODE.

See § 762.

The penal part as No. 2, with such penalty as the county judge may direct and substitute the following condition :

The condition of the above obligation is such, that if the said , who is the sheriff of the county of (or constable of the county of) shall pay over all moneys by him collected or received by virtue of any warrant or other process directed and delivered to him for execution under and pursuant to the provisions of the Military Code of this state, to the officer or officers to whom the same is or may be by law directed to be paid, when collected, without fraud or delay, then this obligation to be void : otherwise to remain in full force.

(L. S.)

Scaled and delivered in

(L. S.)

the presence of

(L. S.)

The statute does not declare to whom the bond shall be given, nor the penalty. There can be no doubt however, that it should be given to the people. And as the county judge is required to approve of it, he, it is thought, should be the officer to determine the amount of the penalty. The oath to the surety, and the indorsement of approval should be in the same form as in the case of the sheriff's official bond.

No. 6.

OATH OF THE SURETY.

See § 3.

County of ss. A. B. and C. D., the surety in the within bond being severally duly sworn, each for himself says that he is a freeholder within the state of New York, and is worth the sum of thousand dollars, over and above all debts whatsoever owing by him.

Sworn to this day of 187

A. B.

before me

C. D.

R. H., Clerk of county.

or, county Judge of county.

No. 7.

CLERK'S APPROVAL TO BE INDORSED ON THE BOND.

See § 3.

I approve of the within bond, as to its form and manner of execution, as well as to the sufficiency of the surety.

J. B., Clerk of county.

or, county Judge of county.

No. 8.

CLERK'S CERTIFICATE THAT THE SHERIFF HAS QUALIFIED.

See § 6.

County of ss. I certify that C. D., sheriff elect of the county of has this day taken the constitutional oath of office, and caused the same, together with the bond required by law, duly approved by me, by my certificate thereof, indorsed thereon, to be filed in my office.

In witness whereof I have hereunto set my hand and affixed
(L. s.) my seal of office this day of January, 1871.

A. B. Clerk of county.

No. 9.

ASSIGNMENT BY THE OLD SHERIFF TO THE NEW SHERIFF.

See § 6.

THIS INDENTURE, made the day 187 , between A. B., late sheriff of the county of of the one part, and C. D., now sheriff of the said county, of the other part, as follows: Whereas, the said C. D., has this day served on the said A. B., the certificate of the clerk of the said county, that the said C. D., has taken the constitutional oath of office, and has caused the same, with the bond required by statute, duly approved by said clerk, to be filed in the office of the clerk aforesaid; Now therefore, this indenture witnesseth that the said A. B., as such late sheriff as aforesaid, in pursuance of the statute in such case made and provided, hath delivered possession and set over to the said C. D., as such sheriff, the county jail (or jails) of the said county and the appurtenances; and also the following processes, papers and prisoners, to wit:

A summons and complaint and copies thereof, in the supreme court, at the suit of against dated A. B., Attorney.

A summons, affidavits and order of Hon. C. H. D., a justice of the supreme court, and copies thereof, to hold the defendant to bail in the sum of \$ wherein is plaintiff and defendant. A. B., Attorney.

An execution upon a judgment in the supreme court, in which is plaintiff and defendant, for \$ rendered 18 received 18, at o'clock, P. M. A. B., Attorney.

An execution against the body of at the suit of for \$ docketed and received A. B., Attorney.

The defendant has been arrested thereunder, and is now upon the liberties of the jail of said county.

Also, the bond of said with as his surety, for the liberties of said jail, in the penalty of \$ and dated 18

Also, the body of confined in the said jail for grand larceny upon the warrant of commitment of the recorder of the city of and also the said warrant.

Also, the jail records, now at the jail; three stoves; blankets; cords of wood, &c.

In witness whereof, the said party of the first part has hereunto affixed his seal and name of office the day and year first above written.

A. B., (L. S.)
Late Sheriff of county.

No. 10.

ACKNOWLEDGMENT OF THE NEW SHERIFF OF THE RECEIPT OF THE
JAILS, ETC., INDORSED ON A DUPLICATE OF SUCH INDENTURE.

See § 6.

I acknowledge the receipt, this day of January, 187
of the property, processes, documents and prisoners specified in the
indenture between A. B., late sheriff of county, and myself,
as present sheriff of said county, of which the within is a duplicate.
C. D., Sheriff of county.

No. 11.

DESIGNATION OF PLACE OF KEEPING THE SHERIFF'S OFFICE.

See § 23.

To all whom it may concern: Take notice, that the office of the
sheriff of county will be kept at in the of
in said county. Dated 18
A. B., Sheriff of county.

No. 12.

APPOINTMENT OF UNDER SHERIFF, DEPUTIES AND JAILER.

See § 14.

Know all men by these presents, that I, the undersigned, sheriff of
the county of do hereby appoint of in said
county, under sheriff, (deputy sheriff, or deputy sheriff and jailer) in
and for said county.

In witness whereof I have hereunto set my hand and seal this
day of 18 A. B., Sheriff, (L. S.)

No. 13.

DEPUTY'S BOND.

See §§ 18, 21.

Know all men by these presents, that we are held and firmly
bound unto A. B., sheriff of the county of and state of
New York, in the sum of thousand dollars, to be paid to the
said or his certain attorney, executors, administrators or
assigns; for which payment, well and truly to be made, we bind
ourselves, our heirs, executors and administrators, jointly and severally
firmly by these presents. Sealed with our seals and dated the
day of in the year one thousand eight hundred and seventy

Whereas, the above bounden has been appointed to the office of under sheriff, (deputy sheriff, or deputy sheriff and jailer) of the said county of by the said as such sheriff:

Now the condition of this obligation is such, that if the above bounden shall well and faithfully execute and discharge the duties of the said office of under sheriff during his continuance therein, without any deceit, fraud, delay, neglect or oppression, and shall save harmless and indemnify the said A. B., his executors and administrators from and against all acts or doings, or neglect of duty of him the said as such under sheriff, and pay off and discharge and save him harmless of and from all judgments, penalties, fines, costs, charges and damages in any action or proceeding that may be brought against the said as such sheriff, by reason of any act or omission done, committed or suffered by the said as such under sheriff; and will likewise pay and discharge and save the said A. B., harmless from any costs and expenses he may incur or be put to in defending any action or proceeding commenced against him as such sheriff, by reason of any acts or doings, or neglect of duty of him the said as such under sheriff, whether such action or proceeding is rightfully brought against the said A. B., as such sheriff, or not; and that the said will pay to the said A. B., as such sheriff, his proportion of the legal fees received by him the said at any time, as such under sheriff as aforesaid; and also that the said will, at the termination of his appointment as such under sheriff, account to and with the said A. B., his representatives, assigns or duly authorized agent, for all moneys collected or received by him as such under sheriff as aforesaid, including all legal fees for services as such under sheriff, and will pay over all moneys collected by him as aforesaid and remaining in his hands, as well as the portion or share of the legal fees received by him the said as such under sheriff as aforesaid, to which the said A. B. is entitled; then this obligation to be void, otherwise to remain in full force and virtue,

(L. S.)

Signed, sealed and delivered in

(L. S.)

the presence of

(L. S.)

No. 14.

ACKNOWLEDGMENT OF BOND BY PARTIES.

County of ss. Personally appeared before me this day of to me known to be the persons described in and who executed the foregoing instrument, and who severally acknowledged

that they executed the same for the use and purposes therein mentioned.
A. B., Justice of the Peace of said county.

No. 15.

REQUEST TO APPOINT A SPECIAL DEPUTY.

See § 18.

To A. B., Esq.,

Sheriff of

county:

Please to deputize as special deputy at the instance and request of the plaintiff and at his peril, (or, at my instance and peril,) to execute a writ of execution against property at the suit of against for \$ docketed in the office of the clerk of county; and for so doing, this shall be your indemnity.
C. D.

No. 16.

DEPUTATION OF SPECIAL DEPUTY.

See § 14.

I hereby deputize and appoint A. B., of to execute the within (attachment against defaulting witnesses,) according to the exigency thereof. Dated, 18

C. D., Sheriff of county.

No. 17.

RESIGNATION OF THE SHERIFF.

See § 9.

To His Excellency, J. T. H.,

Governor of the State of New York:

Sir: I hereby resign the office of sheriff of the county of to take effect upon the appointment of a person to execute the duties of the office.
A. B., Sheriff of county.

No. 18.

REPRESENTATION THAT THE SHERIFF IS IN CUSTODY FOR THE NON-PAYMENT OF MONEY.

See § 10.

To the Governor of the State of New York:

STATE OF NEW YORK, } ss.
County of }

In pursuance of the statutes of this state, I, the undersigned, one

of the coroners of said county, do represent that sheriff of said county, has been committed to my custody as such coroner, by virtue of an execution (or attachment) for the nonpayment of money received by him, in virtue of his office of sheriff, and that he has remained so committed for the space of thirty days, successively.

Dated

C. D., Coroner of county.

No. 19.

DESIGNATION OF A CORONER TO EXECUTE THE OFFICE OF SHERIFF.

See § 992.

STATE OF NEW YORK, }
County of } ss.

A vacancy having occurred in the office of sheriff of county, and there being no under sheriff of said county in office, (or the office of under sheriff of the said county having become vacant;) (or the under sheriff of said county having become incapable of executing the said office,) and there being more than one coroner of said county in office, I, the county judge of said county, in pursuance of the statutes in such case, hereby designate one of the coroners of said county, to execute the office of sheriff of said county, until a sheriff thereof shall be elected or appointed and qualified.

Given under my hand and seal, this day of, &c.

J. W., County Judge. (L. s.)

No. 20.

APPOINTMENT OF A PERSON TO EXECUTE THE OFFICE OF SHERIFF.

See §§ 996, &c.

STATE OF NEW YORK, }
County of } ss.

Vacancies in the office of sheriff and under sheriff of said county having occurred, and A. B., the coroner solely in office, (or all the coroners of said county in office having successively) neglected or refused to execute, within the time required, the bond required in such case, I, the county judge of said county, do hereby appoint C. D., of to execute the office of sheriff of the same county, until a sheriff shall be duly elected, or appointed and qualified.

Given under my hand and seal, &c.

J. W., County Judge of county. (L. s.)

No. 21.

NOTICE OF SAID DESIGNATION.

To A. B.:

Sir: You have been this day designated by the county judge of county, to execute the office of sheriff of said county, until a sheriff thereof shall be elected, or appointed and qualified.

Dated

J. B., County Clerk.

No. 22.

REMOVAL FROM OFFICE OF UNDER SHERIFF OR DEPUTY.

See § 15.

To C. D.:

Sir: You are hereby removed from the office of under sheriff, (or deputy sheriff) of the county of and will forthwith hand over all processes and papers in your hands as such under sheriff (or deputy) for service.

Dated

187

A. B., Sheriff

No. 23.

RESIGNATION OF THE UNDER SHERIFF OR DEPUTY.

See § 15.

To A. B., Sheriff of the county of

Sir: I hereby resign the office of under sheriff (or deputy sheriff) of the county of

C. D.

No. 24.

ADMISSION OF RECEIPT OF CRIMINAL PROCESS BY THE SHERIFF.

See § 29.

THE PEOPLE	}	Bench warrant of District Attorney of county, on indictment for forgery. Dated and received by me for execution	187
ag't.			
C. D.			

A. B., Sheriff,
by E. F. Deputy.

No. 25.

RETURN OF RESCUE AND RESISTANCE TO CRIMINAL PROCESS.

See § 36.

STATE OF NEW YORK, }
county, } ss. I, the sheriff of said county, do certify
and return to the court of oyer and terminer in and for county,

now here, that by virtue of the within warrant, delivered to me for execution on the day of I did on the day of 187 proceed, as by the said writ I was commanded, to execute the same; and that when I had arrived at the dwelling of the said in in said county, and had demanded admittance after having duly announced the purpose of my coming, I was resisted and violently assaulted by the said and his son, and one then present, and was violently beat and bruised by the said and that in consequence of said resistance I was unable to execute the said writ alone or with the aid of my deputies, but was compelled to raise the power of the county to aid in enforcing the execution of the same.

Dated 187

A. B.

Sheriff of county.

No. 26.

RETURN OF RESCUE AND RESISTANCE TO AN EXECUTION.

See § 36.

STATE OF NEW YORK, }
County of } ss.

I, the sheriff of said county, do certify and return to the supreme court now here, that by virtue of the within execution, to me directed and delivered for execution, I did on the day of between the hours of ten and eleven o'clock in the forenoon proceed to the residence of the defendant in in said county to execute the same as I am therein commanded, and that having been invited into the dwelling house of the defendant by the said defendant, I then and there in due form levied on one piano forte then in the possession of the said defendant under and by virtue of the said execution, and while taking the same into my possession, I was violently resisted by the said and one and then and there aiding the said defendant, and who then and there violently and with force rescued the said levy and ejected me from the house, and that before I could command assistance to retake the same the said piano forte was removed and I have not been able to find the same since.

A. B.

Sheriff of county.

No. 27.REQUISITION OF THE SHERIFF FOR MILITARY AID IN EXECUTING
PROCESS.

See § 38.

To Brigadier General
Colonel
or, Captain

Having been this day resisted in the execution of a warrant of a magistrate for the arrest of C. D. charged with murder, (or having reason to apprehend that I will be resisted in the execution of a writ of possession against C. D.) I, the sheriff of the county of _____ in pursuance of the statutes of this state in such case made and provided, do hereby require you and the military under your command (or _____ men of your command) armed and equipped as the law directs to aid me in the execution of said warrant (or writ of possession) and that you report yourself forthwith to me (or on the _____ day of _____ at _____ o'clock in the forenoon) with your said command, (or with the said number of men) ready for service at _____.

Dated _____ 187 _____

A. B.
Sheriff of _____ county.

No. 28.

REQUISITION OF THE SHERIFF FOR MILITARY AID TO QUELL A RIOT.

See §§ 38, 43, 757.

To Brigadier General
Colonel
or Captain,
Sir:

A riot and breach of the peace having occurred at _____ in the county of _____ I, the sheriff of said county, do hereby, in pursuance of the statute in such case made and provided require you with the military under your command (or a company of the military under your command) armed and equipped as the law directs to aid me in quelling said riot and breach of the peace; and that you report yourself forthwith to me at _____ with your said command (or with a company of the men under your command) ready for service.

Dated _____ 187 _____

A. B., Sheriff.

No. 29.REQUISITION OF THE SHERIFF FOR MILITARY AID IN PREVENTING THE
DESTRUCTION OF PROPERTY.

See §§ 38, 48, 757.

To Brigadier General, &c.

Sir: Having been notified by C. D., that certain lawless persons have combined and threatened (or are attempting) to destroy the dwelling of the said C. D., I do therefore in pursuance of the statute in such case made and provided require you with the military under your command, (or one hundred men under your command,) armed and equipped as the law directs to aid me in preventing the destruction of said property; and that you report yourself forthwith to me with your said command ready for service at, &c.

Dated 18 A. B., Sheriff of county.

No. 30.

RETURN TO WARRANT ON ARREST.

I have arrested the within named defendant, and have him now here in my custody before the court, as I am within commanded.

A. B., Sheriff.

No. 31.

RETURN OF ARREST AND COMMITMENT TO JAIL.

I have arrested the within named defendant and have committed him to jail.

A. B., Sheriff.

No. 32.

RETURN WHERE SOME FOUND AND OTHERS NOT FOUND.

I have arrested the within named defendant, and have him
now here before the court; but the within named cannot be
found. A. B., Sheriff.

No. 33.

RETURN TO WARRANT FOR LARCENY WHERE THE PROPERTY IS FOUND.

See § 68.

I have arrested the within defendant and have also taken the property alleged to be stolen, which I found on the person of the defend

ant, (or in the possession of the defendant,) and have him and the said property now here before the court.

A. B., Sheriff.

No. 34.

RETURN WHERE THE MAGISTRATE ISSUING THE WARRANT IS ABSENT.

See §§ 71, 72.

I have arrested the within defendant as I am within commanded; and I further return that on making such arrest, I forthwith brought the said defendant to the office of the magistrate before whom the within warrant is made returnable, but that said magistrate was then absent therefrom and could not be found, to proceed upon the said warrant.

A. B., Sheriff.

No. 35.

RETURN WHERE THE MAGISTRATE ISSUING THE WARRANT HAS GONE OUT OF OFFICE.

See §§ 71, 72.

I have arrested the within defendant as I am within commanded; and I further return, that at the time of such arrest, the magistrate issuing the within warrant, had ceased to be such magistrate, by the expiration of his term of office, (or by resignation of his said office, or removal from office, or removal from the town, or county.) Dated 18 A. B., Sheriff.

No. 36.

INDORSEMENT OF WARRANT IN ANOTHER COUNTY.

See §§ 62, 73.

County of ss. It appearing satisfactorily to me by the oath of that the signature of to the within warrant, is in the hand writing of said the justice of the peace within mentioned; I do therefore hereby authorize the person bringing this warrant, or any other officer to whom such warrant may be directed, to execute the same in said county of

A. B., Justice of the Peace of county.

No. 37.

RETURN TO SUCH WARRANT WHERE THE DEFENDANT DESIRES TO BE LET
TO BAIL IN THE COUNTY WHERE ARRESTED.

I have arrested the within defendant, in pursuance of the within
warrant, and of the indorsement thereon. Dated 18
A. B., Sheriff of county.

No. 38.

CERTIFICATE OF MAGISTRATE LETTING THE PRISONER TO BAIL.

I certify that the within defendant, having been brought before me
by the officer making return thereto, and such defendant requiring to
be let to bail by me, I have taken his recognizance with and
of in said county, in the sum of for his appear-
ance at the next court having cognizance of the offence, in the county
of and have delivered such recognizance and this warrant to
such officer. Dated 18
C. A., Justice of the Peace of county.

No. 39.

RETURN TO SEARCH WARRANT FOR THE DELIVERY OF OFFICIAL BOOKS
AND PAPERS.

See §§ 8, 630.

I have searched the place designated in the within warrant, and
cannot find the within mentioned official books and papers or any of
them (or have found the within mentioned books and papers, and
have the same here.)

A. B., Sheriff.

No. 40.

RETURN TO SEARCH WARRANT FOR STOLEN GOODS.

See § 79, &c.

I have executed the within search warrant as I am within com-
manded, by making diligent search in the place designated in the said
warrant for the goods therein described; but cannot find the said
goods, or any part thereof. Dated, 18

A. B.,
Sheriff of county.

No. 41.

THE SAME WHEN GOODS ARE FOUND.

I have executed the within search warrant, as I am within commanded, and have found the said goods in the place designated, and have them now here, as I am within commanded. Dated, 18

A. B.,
Sheriff of county.

No. 42.

THE SAME WHERE GOODS ARE FOUND, AND PERSON IN WHOSE POSSESSION THEY WERE, ARRESTED.

See § 80.

I have executed the within search warrant as I am within commanded, and have found the said goods in the place designated, in the possession of C. D. ; and there being reason to believe that he is the person who stole them, have arrested him and have him now here with the said goods.

A. B., Sheriff,
by C. B., Deputy.
or, E. F., Constable.

No. 43.

THE SAME WHERE OTHER GOODS ARE FOUND IN THE PLACE DESIGNATED, SUPPOSED TO BE STOLEN, ARE TAKEN.

See § 80.

I have executed the within search warrant as I am within commanded, and have found the said goods in the place designated ; and I have also found in the same place a piece of silk and a piece of linen, and which it is reasonable to believe were stolen also, and I have the same, with the goods described now here before the court as I am within commanded.

A. B., Sheriff.

No. 44.

RETURN TO SEARCH WARRANT UNDER THE STATUTES TO PREVENT GAMING.

See § 116.

I have made diligent search at the place designated and on the

person of the defendant for the gambling apparatus described in the within warrant, and have found and taken the following, which I have now here before the court as I am within commanded.

A. B., Sheriff.

FORMS ON THE INVESTIGATION OF THE ORIGIN OF FIRES.

No. 45.

See § 124.

SUBPÆNA FOR WITNESS.

The people of the state of New York to A. B., C. D., and E. F.

We command you and each of you that all business and excuses being laid aside you be and appear before the undersigned sheriff (or one of the coroners) of the county of at and on, &c., to testify and give evidence upon an inquest then and there to be had to investigate the origin of the fire at the dwelling of G. F., on street, in on the 187 , and hereof fail not at your peril.

Witness the hand of the said sheriff (or coroner) this day of 187

G. H. Sheriff of county.
or, J. K., Coroner of county.

No. 46.

OATH TO FOREMAN OF JURȲ.

You do swear that you will well and truly inquire whether the dwelling house of E. F., situate on street in which was lately injured (or destroyed) by fire, was maliciously set on fire, (or attempted to be set on fire,) and how and in what manner such fire happened (or was attempted) and all the circumstances attending the same and who are guilty thereof, either as principal or accessory and in what manner; and that you will make a true inquisition thereof according to the evidence offered you or arising from an investigation of the place where the fire was (or was attempted;) so help you God.

No. 47.

OATH TO THE JURORS.

The same oath which K. L., the foreman of this inquest hath on his part taken, you and each of you do now take, and shall well and truly observe and keep on your part, so help you God.

No. 48.

OATH TO WITNESSES.

The evidence you shall give upon the inquest concerning the burning (or attempted burning) of the dwelling house of E. F., situate on street in lately destroyed (or injured) by fire, shall be the truth, the whole truth and nothing but the truth; so help you God.

No. 49.

EXAMINATION OF WITNESSES BEFORE THE JURY.

County ss. Examination of witnesses produced, sworn and examined on day of at before A. B., sheriff (or C. D., one of the coroners) of the county of and jurors good and lawful men of the said county, duly summoned and sworn by the said sheriff (or coroner) to inquire whether the dwelling house of E. F., situate on street in which was lately injured (or destroyed) by fire, was maliciously set on fire or attempted to be, and how and in what manner such fire happened or was attempted, and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner, and to make true inquisition, according to the evidence, or arising from an investigation of the place where the fire was (or attempted.)

M. N. being duly sworn and examined, testifies and says that—

Subscribed and sworn before me (Signed) M. N.
this day of 187

A. B., Sheriff.

or, C. D., Coroner.

The testimony of the other witnesses to follow.

CERTIFICATE TO BE ANNEXED TO THE TESTIMONY.

I do hereby certify that the foregoing testimony of the several witnesses appearing upon the inquest was reduced to writing by me, and that the foregoing testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated as given by the witnesses respectively.

A. B., Sheriff.

or, C. D., Coroner.

Whereas, by the inquisition of good and lawful men of said county, taken upon their several oaths before me, the sheriff (or one of the coroners) of said county, at in which E. F. is charged with having designedly set on fire the dwelling house of said E. F. for the purpose of defrauding the insurance company of the amount of the policy held by the said E. F. on the premises; you are therefore hereby commanded in the name of the people of the state of New York forthwith to arrest the said E. F. and bring him before me at to be dealt with according to law.

Given under my hand and seal this day of 187

A. B., Sheriff.

No. 52.

WARRANT OF COMMITMENT OF THE INCENDIARY.

The People of the state of New York to the sheriff (or any constable or marshal) of the county of and to the keeper of the common jail of said county:

Whereas, E. F. having been charged upon inquisition taken before A. B. the sheriff, (or C. D. one of the coroners) of said county on the oath of with having designedly set on fire the dwelling house owned by him for the purpose of defrauding the insurance company of the amount of the policy issued by it to him on the premises, and the said E. F. having been brought before the said A. B. (or C. D.) to answer to the said charge, and having taken the examination of the said E. F.

These are therefore to command you the said sheriff, constable or marshal, that you forthwith convey and deliver to the keeper of the said jail, the said E. F. and you, the said keeper are hereby required to receive the said E. F. into your custody in the said common jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal at in said county, the
day of 187

A. B., Sheriff,
or, C. D., Coroner.

No. 53.

RECOGNIZANCE BY WITNESSES ON THE INQUEST.

County, ss: Be it remembered that on this
day of day of 187, I. K., L. M. & N. O. of
in said county, personally appeared before me A. B. sheriff (or C. D.

one of the coroners) of said county, and severally acknowledged themselves to be indebted to the people of the state of New York each separately in the sum of dollars, to be made and levied of their goods and chattels, lands and tenements to the use of the said people, if default shall be made in the condition following: The condition of this recognizance is such that if the above bounden I. K., L. M., N. O., shall personally be and appear at the next court of oyer and terminer, to be held in and for the said county of to give evidence in behalf of the people against E. F. for wilfully setting fire to his dwelling house, situate on street in on or about as well to the grand jury as the petit jury, and do not depart the said court without leave, then this recognizance to be void and of no effect; otherwise to remain in full force.

Subscribed and acknowledged the
day and year first above written.

J. K.
L. M.
N. O.

No. 51.

RECOGNIZANCE BY A WITNESS WITH SURETIES.

County, ss: Be it remembered that on this day of 187 , J. K. and M. N. and O. P. all of the town of in said county, personally came before me, the sheriff (or one of the coroners) of the said county, and severally acknowledged themselves to be indebted to the people of the state of New York, in manner following: the said J. K. in the sum of and the said M. N. and O. P. in the sum of each to be levied of their respective goods and chattels, lands and tenements to the use of the said people, if default shall be made in the following conditions:

The conditions of the above recognizance is such that if the above bounden J. K. shall personally be and appear at the next court of oyer and terminer, to be held in and for the said county of to give evidence in behalf of the people against E. F. for wilfully setting fire to his dwelling house, situate on street in on or about as well to the grand jury as the petit jury and do not depart the said court without leave, then this recognizance to be void and of no effect; otherwise to remain in full force.

Subscribed and acknowledged the
day and year first above written.

I. K.
L. M.
N. O.

No. 55.

SHERIFF'S PROCLAMATION.

See § 157.

PROCLAMATION.—Whereas a court of oyer and terminer is appointed to be held at the court house in in and for the county of on the day of 18 proclamation is therefore hereby made in conformity to a precept to me directed and delivered by the district attorney of county on the day of 18 to all persons bound to appear at the said oyer and terminer by recognizance or otherwise, to appear thereat, and all justices of the peace, coroners and other officers who have taken any recognizance for the appearance of any person at such court, or who have taken any inquisition or the examination of any prisoner or witness, are required to return such recognizance, inquisition and examination to the said court at the opening thereof, on the first day of its sitting. Given under my hand at the sheriff's office in the of on the day of 187

A. B., Sheriff of county.

No. 56.

RETURN TO THE PRECEPT OF THE DISTRICT ATTORNEY.

See § 157.

County of ss. I have executed the within precept as I am within commanded, by having duly summoned the jurors drawn for the court mentioned therein, to appear thereat; by making immediate proclamation as therein commanded, and causing the same to be published in a public newspaper printed in said county once a week from the receipt of the said precept, until the time appointed for said court,* and by having the prisoners in jail brought before the court with all process and proceedings in any way concerning them in my hands. Dated 18

A. B., Sheriff of county.

No. 57.

RETURN TO PRECEPT WHERE THE PRISONERS ARE NOT ALL BROUGHT INTO COURT.

See § 154

The same as the last, to the asterisk; then add, "and that I am ready to bring before the court now here the prisoners in jail as it may direct."

Dated 187

A. B., Sheriff of county.

No. 58.

SUMMONS TO CONSTABLE TO ATTEND COURT.

See § 154.

SHERIFF'S OFFICE OF COUNTY, }
18

To C. D., Constable of the town of in said county :

Sir: You are hereby summoned to attend as a constable, at the sitting of the supreme court at the court house in the of on the day of at ten o'clock in the forenoon.

A. B., Sheriff.

No. 59.

CERTIFICATE OF THE ATTENDANCE OF CONSTABLES AT COURT.

County of ss. I certify that the following constables were summoned by me to attend the sitting of the supreme court, held at the court house in the of commencing on the day of 18 and that they have attended as such constables, the number of days set opposite their names respectively:

A. B., four days.

C. D., five days.

Dated 18

E. F., Sheriff of county.

No. 60.

CALENDAR OF PRISONERS IN JAIL, FOR THE COURT.

See §§ 158, 237, 262.

To the court of of county, now here :

I, the undersigned, sheriff of the said county, do certify that the following calendar is a correct list of the prisoners now detained in the jail of said county, the times when committed, by what process, and the cause of commitment. Dated 18

A. B., Sheriff.

PRISONERS' NAMES. WHEN COMMITTED. THE PROCESS. NATURE OF THE OFFENCE.

A. B.	March 4, 187	Justices' Commitment.	Petit Larceny.
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No. 61.

DIRECTIONS TO DEPUTY TO SUMMON JURORS, AND HIS RETURN.

To C. D., Deputy sheriff:

You will summon the persons named below, to appear at the court

of to be held at the court house in on the day
of next, at o'clock, A. M., as grand and petit jurors
as indicated below, opposite their respective names. They are to be
summoned at least SIX DAYS before the first day of the court, by
notifying each of them personally, that they are drawn as such jurors,
and informing them of the time and place where they are required to
attend ; or if they cannot be found, then they may be summoned by
leaving at their respective places of residence, with some person of
proper age, a written or printed notice (copies of which are herewith
enclosed.) 'And you will return this to me as soon as the service is
complete, and previous to the sitting of the court, first noting
opposite the names of the persons summoned respectively, the time
when summoned, and the manner in which they were summoned,
whether personally or by leaving a notice at their respective places
of residence, and signing the certificate below.

Yours, &c.

A. B., Sheriff of county.

RETURN OF SERVICE.

PERSONS TO BE SUMMONED.	WHEN SUMMONED.	HOW SUMMONED.
Grand Jurors, A. B.	May 14, 1871.	Personally.
C. D.	“ 17, “	By leaving notice with his
		wife, in his absence
Petit “ E. F.	“ 18, “	Personally

The above named grand and petit jurors were duly summoned; by
me for the term of the court above designated, at the times and in the
manner set opposite their names respectively.

A. B., Deputy Sheriff.

No. 62.

NOTICE TO A JUROR WHO CANNOT BE SUMMONED PERSONALLY.

Mr. C. D., of Merchant :

Sir: You have been drawn to serve as a juror at a court of
to be held at the court house in on the day
of at 10 o'clock, A. M., whereat you are required to attend
without fail.

A. B., Sheriff of county.

No. 63.

RETURN OF JURY LIST OF SUMMONING JURY.

See § 164.

County of ss. To the court of of county,
now here :

I, the sheriff of said county, to whom the within lists of jurors for

said court were delivered for service, herewith return the same to the court now here; and I certify and return that all the said grand and petit jurors therein named, were duly personally summoned to attend said court at the time and place mentioned in the said lists, at least six days previous to the sitting of the said court; except A. B. and C. D., who could not be found, but who were in like manner duly summoned to attend, as aforesaid, by leaving at their respective places of residence, with persons thereat of proper age, a partly printed and partly written notice, stating that they were drawn as such jurors, and designating the court, time and place at which they were required to appear; and E. F., who has removed from the county, and G. H., who cannot be found in the county, and who has no known place of residence therein. Dated 18

A. B., Sheriff of county.

No. 64.

RETURN OF NEW GRAND JURY OR TALESMEN.

See §§ 168, 169.

County of ss. Pursuant to the direction of the court of
of said county, now here, contained in the annexed certified
copy of order of said court, I have summoned the following persons
to appear forthwith, to serve as grand jurors (or petit jurors,) to wit:
A. B., farmer, of ; C. D., mechanic, of ;
A. B., Sheriff.

No. 65.

RETURN TO JURY LIST DRAWN AT THE COURT.

See § 169.

County of ss.

I the sheriff of said county do certify and return that I have duly personally summoned to attend this court forthwith, (or at) the following persons as jurors whose names were duly drawn by me in the presence of the court for that purpose: A. C., D. E., F. G., &c., and that C. D. and G. H. could not be found, and that service was made on them by leaving a written notice of the time and place where they were to appear at their respective places of residence with persons of suitable age.

A. B., Sheriff.

No. 66.

RETURN TO VENIRE FOR FOREIGN JURY.

See § 181.

The execution of the within venire will appear by the schedule hereto annexed.

A. B., Sheriff.

(Attach the Clerk's list of jurors to the venire, and make certificate thereon, as No. 63.)

No. 67.

PROOF OF SERVICE OF A SUBPENA, OR SUMMONS IN A CIVIL CASE.

See §§ 180, 181, 182.

County of ss. being duly sworn, says that he duly
subpœnaed (or summoned) the several persons named below, at the
times and places set opposite to their respective names, by delivering
to each of such persons, personally, a copy of the subpœna, (or sum-
mons) hereto annexed, (or a ticket containing the substance thereof)
and at the same time showing to each of them, respectively, the
annexed original subpœna (or summons) and paying to each of said
witnesses, respectively, the sum also set opposite to their respective
names, for their fees in going to, and returning from the place where
they are by said subpœna (or summons) required to attend, and also
for one day's attendance thereat, to wit:

H. H., January	18	at	in said county, \$1.75
C. D., “	“	“	“ 1.50
E. F., “	“	“	“ 1.50

Subscribed and sworn before me,
this day of _____ A. B.

No. 68.

PROOF OF SERVICE OF A SUBPENA IN A CRIMINAL CASE.

See §§ 181, 182.

The same as the last in all respects, except as to the payment of fees to the witnesses.

No. 69.

PROOF OF SERVICE OF A SUBPENA WHERE THE SERVICE IS MADE BY
READING THE SUBPENA.

County of ss. A. B., being duly sworn, deposeth and saith,

that on the day of 18 he served the within subpœna upon the within named and by reading the same to them respectively, (or stating the contents thereof.) (If the subpœna is issued in a civil cause, before a justice of the peace, add) and by paying (or tendering to each of them respectively) the sum of 25 cents for one day's attendance at the place mentioned in said subpœna.

Subscribed and sworn before me
this day of 18

A. B.

No. 70.

PROOF OF SERVICE OF SUBPœNA, WHERE THE WITNESS CONCEALS HIMSELF.

See § 289.

(The same as proof of service of a summons under the same circumstances. See forms Nos. 120, 121.)

No. 71.

ATTACHMENT AGAINST A WITNESS

See §§ 183, 184, 185.

The people of the state of New York, to the sheriff of the county of
greeting:

(L. s.) We command you that you attach and bring him forthwith, personally, before our circuit court (county court) held in and for our county, of on at, &c., to answer unto us for certain trespasses and contempts against us in not obeying our writ of subpœna, commanding him to appear on, &c., at, &c., before said court, to testify in a suit there to be tried between plaintiff and defendant, on the part of the plaintiff (or defendant;) and you are further commanded to detain him in your custody until he shall be discharged by our said court; and have you then there this writ.

Witness, justice of the supreme court, (or county judge of said county) at the court house in the town of in said county, the day of 18 J. B., Clerk.

A. B., Attorney.

(Endorsed on the writ.)

Allowed this day of 18

C. H. D., Justice Supreme Court.
or J. W., County Judge.

No. 72.

THE SAME IN A CRIMINAL CASE.

The people of the state of New York, to the sheriff of the county of
greeting:

(L. S.) We command you that you attach and bring him
forthwith personally before our court of oyer and terminer
(or court of sessions) held in and for our county of at, &c., to
answer unto us for certain trespasses and contempts against us in not
obeying our writ of subpœna, commanding him to appear on, &c., at
&c., before said court, (or not appearing in pursuance of his recog-
nizance) to testify on an indictment there to be tried against
on the part of the people, (or defendant) and you are further com-
manded, &c., (as the last, and to be indorsed in the same way.)

No. 73.

RETURN TO SUCH ATTACHMENTS.

I have arrested the within named as I am within commanded,
and have him now here before the court. Dated 18
A. B., Sheriff.

No. 74.

RETURN WHEN THE WITNESS IS SICK.

See § 184.

At the delivery of the within attachment to me for execution, the
within named defendant then was and still continues so sick and
unwell, that it would be dangerous to bring him before the court here,
as I am within commanded; wherefore I have not the body of the
said before the court now here, according to the command of the
within attachment. Dated 18

A. B., Sheriff of county.

No. 75.

PERMIT OF JAIL PHYSICIAN TO FURNISH LIQUOR.

County of ss. I hereby permit to be furnished for A. B.,
a prisoner now confined in the jail of said county, at, &c., one pint
of cogniac brandy to be given to the said A. B. times a day
at &c. in quantities not exceeding one tablespoonful at
each time; and that it satisfactorily appears to me that the said liquor
in the quantities mentioned is absolutely necessary for the health of
the said prisoner.

C. D., Physician of said jail.

No. 76.

JAIL RECORD OF COMMITMENTS AND DISCHARGES.

See § 225.

Prisoners' names.	When committed.	Offence.	Term of sentence.	Fine.	Age.	Sex.	Country.	Color.	Social relations.
A. B.	April 1, 1871.	Grand larceny.	Until the sitting of the grand jury.		20 years.	Male.	New York.	White.	Unmarried.
C. D.	May 1, 1871.	Petit larceny.	Sixty days.	\$10	16 years.	Female.	New York.	Black.	do.

Parents.	Habits of life.	Cannot read.	Read only.	Read and write.	Well educated.	Classically educated.	Religious instruction.	How committed.	By whom committed.	State of health when committed.
Father and mother.	Bad.									
None.	Good.	"	"				None.	By warrant	Recorder of A. B., Justice.	Good.

How discharged.	Trade or occupation.	Whether so employed when arrested.	No. of previous convictions.	Value of articles stolen.	When discharged.	When let to bail.	Escaped.	When sentenced to state prison.	When removed.
Sentenced to state prison.	None.		One. None.	\$50. \$5.	July 1, 1871			June 6, 1871.	June 10, 1871

No. 80.

ACCOUNT OF GOODS PURCHASED FOR EMPLOYMENT OF PRISONERS.

See § 238.

The county of

	To A. B. sheriff of said county,	Dr.
To	purchased for employment of disorderly persons	
	in the jail of said county,	\$500 00
Dated	187	

County of ss. A. B. sheriff of said county, being sworn, says, that the above account is a correct statement of the articles purchased by this deponent, under and pursuant to the order of the court of sessions of said county, a copy of which is hereto annexed; and further saith not.

Subscribed and sworn before me	A. B.
this day of 18	

No. 81.

REPORT TO THE COURT OF SESSIONS OF DISPOSITION THEREOF.

To the court of sessions of the county of

The following is a true account and statement of the materials purchased by me, under and pursuant to the order of this court, made on the day of 187

A. B., sheriff of the county of

In account with said county :

To cash received of the county treasurer, under the order of the court, for the purchase of materials for the employment of disorderly persons confined in the jail of said county,	\$500
To sales of articles, over cost of materials,	100
	\$600
By cash paid to county treasurer, amount of purchase,	500
“ “ “ “ one half of surplus,	50
	550
“ “ C. D., one of said convicts, his share of said earnings,	10
“ “ E. T. “ “	20
“ “ G. H. “ “	20
	\$600

County of ss. A. B. sheriff of said county, being duly sworn, says, that the above statement is true and just in all respects
 Subscribed and sworn before me
 this day of 187 A. B.

No. 82.

SHERIFF'S ACCOUNT FOR TRANSPORTING PRISONERS TO STATE PRISON.

See Ante §§ 265, 268.

State of New York,

 To A. B., sheriff of county, Dr.
 For transporting convicts from in said county, to
 prison, as follows :

Transportation miles

Maintenance of convicts days at \$

STATE OF NEW YORK, }
 County of } ss.

A. B. being sworn, says that he is the sheriff of said county of
 and that he transported the convicts named in the foregoing
 account, from in said county, to the state prison at on the
 day of ; that the whole distance traveled by depo-
 nent and said convicts, from the place of conviction to said prison, is
 miles, and that they were thus conveyed by the most direct
 and expeditious route ; that he was necessarily employed days
 in carrying said convicts to said prison, from said place of conviction ;
 and that the said account, amounting in the whole to is in
 all respects correct and true, according to the best of his knowledge
 and belief. And further this deponent says not. A. B.

Subscribed and sworn before me
 this day of 18

H. C., Clerk of Prison.

No. 83.

SHERIFF'S ACCOUNT FOR TRANSPORTING PRISONERS TO HOUSE OF
 REFUGE.

See §§ 267, 268.

The same as last in all respects, substituting the name of the proper
 county, in place of the state of New York, and the house of refuge,
 instead of the state prison.

No. 84.

ACCOUNT AGAINST THE UNITED STATES FOR SUPPORTING PRISONERS.

See § 235.

The United States of America,

Dr.

To A. B., Sheriff of county, New York,
 For supporting C. D., a prisoner of the United States, charged with
 in the jail of said county from day of to
 the day day of both inclusive days, at \$ per week, \$
 Turnkey's fees, receiving and discharging, 75
 Received this day of 18 of the United States,
 from J. M., marshal for the district of New York,
 dollars, in full of the above account, for which I have signed dupli-
 cate receipts. A. B., Sheriff of county.

No. 85.

CONCURRENCE OF JUSTICE OF THE SUPREME COURT, IN CALLING A
 JURY TO INQUIRE AS TO THE SANITY OF A PRISONER
 SENTENCED TO BE EXECUTED.

See § 271.

STATE OF NEW YORK, }
 County of } ss.

It appearing to me that there is reason to believe that A. B., lately
 convicted of murder before the undersigned, a justice of the supreme
 court of this state, at a court of oyer and terminer held at on,
 &c., and who is now under sentence of death in the jail of said county,
 has become insane since the said conviction; I do therefore, in pur-
 suance of the statute in such case made and provided, concur with
 C. D., the sheriff of the said county, in calling a jury to make inquest
 whether the said A. B. be of the same mind or no. Dated 18
 C. H. D., Justice of the Supreme Court.

No. 86.

NOTICE TO THE DISTRICT ATTORNEY OF THE HOLDING THE INQUEST.

See § 271.

To E. F. Esq., District Attorney of county:

SIR: Take notice that with the concurrence of the Hon. C. H. D.
 the justice of the supreme court before whom A. B., now in the jail
 of said county under the sentence of death, was convicted, I shall

proceed to execute an inquest at the jail of the said county in
on the day of 18 at o'clock noon,
to determine whether the said A. B. be of sane mind or no.

Dated 18

C. D. Sheriff of county.

No. 87.

THE LIKE IN THE CASE OF A PREGNANT FEMALE.

See § 273.

SIR: Take notice that on the, &c., I shall proceed to execute an
inquest to determine whether A. B., a prisoner now confined in said
jail under sentence of death, be pregnant and quick with child or no.

Dated 187

C. D., Sheriff of county.

No. 88.

SUBPÆNA OF DISTRICT ATTORNEY.

See § 271.

The People of the State of New York to

Greeting :

We command you that, laying aside all business, you be and
appear at the jail of the county of in on the
day of 18 to testify and give evidence upon an inquest
then and there to be taken before C. D., sheriff of said county, to
determine whether A. B., a prisoner therein confined, and now under
sentence of death, be insane or no ; (or, be pregnant and quick with
child or no ;) and hereof fail not at your peril.

Witness our said district attorney of said county, at the of
in said county this day of 187

C. B., District Attorney.

No. 89.

OATH TO JURORS.

You do each for yourself swear that you will well and truly inquire
whether A. B., the prisoner now here, be of sane mind or no,
(or be pregnant and quick with child or no,) and that you will true
inquest make thereof, according to the evidence. So help you
God.

No. 90.

WHERE A JUROR IS OBJECTED TO.

You shall true answers make to such questions as shall be put to you touching the objection or challenge to you as a juror. So help you God.

No. 91.

TO A WITNESS IN SUCH CASE.

You shall true answers make to such questions as shall be put to you, touching the challenge of a juror. So help you God.

No. 92.

OATH OF WITNESS ON INQUEST.

The evidence you shall give touching the sanity of A. B., the prisoner now here, shall be the truth, the whole truth and nothing but the truth. So help you God.

No. 93.

IN CASE OF PREGNANT FEMALE.

The evidence you shall give upon this inquest whether A. B., the prisoner now here, be pregnant and quick with child or not, shall be the truth, the whole truth and nothing but the truth. So help you God.

No. 94.

INQUISITION AS TO THE SANITY OF PRISONER.

See § 272.

STATE OF NEW YORK, }
County of } ss.

Inquisition taken before the undersigned, sheriff of the county of _____ with the concurrence of C. H. D. the justice of the supreme court, before whom A. B., now confined in the jail of the said county, under sentence of death, was convicted, at the said jail, on, &c., upon the oaths and affirmations of E. F., &c., twelve electors of the said county, summoned by me to inquire as to the sanity of the said A. B. The said jurors being each duly sworn and charged to inquire

touching the sanity of the said prisoner, do upon their oaths and affirmations say that the said A. B. is not in a sound state of mind, but is of insane mind, (or is of sane mind).

In witness whereof, we, the said sheriff, as well as the said jurors, have to this inquisition set our hands and seals at the time and place aforesaid.

Jurors.

A. B.,

E. F., &c.

Jurors.

E. D.,

C. D., Sheriff.

No. 95.

INQUISITION IN CASE OF PREGNANT FEMALE.

See § 273.

STATE OF NEW YORK, }
County of } ss.

Inquisition taken before the undersigned, sheriff of _____ county, at the jail in _____ in said county, on the _____ day of _____ upon the oaths and affirmations of E. F., &c., six physicians of said county summoned by me to inquire whether A. B., a prisoner now confined in said jail under sentence of death, be pregnant and quick with child or no. And the said jurors each being sworn and charged to inquire whether the said A. B. be pregnant and quick with child, and upon their oaths and affirmations say that the said A. B., is now pregnant and quick with child, (or is not pregnant and quick with child.)

In witness whereof, &c., as in the last.

No. 96.

INVITATION TO ATTEND THE EXECUTION OF A CRIMINAL.

See § 276.

SIR: Pursuant to the statute in such case, you are hereby invited to be present at the execution of _____ at the jail of said county in _____ on the _____ day of _____ Dated 18 _____

A. B., Sheriff.

To Hon, C. H. D., Justice of the Supreme Court.

No. 97.

CERTIFICATE OF THE EXECUTION OF A CRIMINAL.

See § 278.

STATE OF NEW YORK, }
County of } ss.

I, the sheriff of the county of and the other public officers and persons whose names are hereto subscribed, do certify that who was sentenced by the court of oyer and terminer held in and for the county of on the day, &c., to be executed on this day, between the hours of ten o'clock in the morning and twelve at noon, was at the time mentioned, in pursuance of the said sentence, executed by hanging by the neck until he was dead, in the jail yard of the jail in the said county; and we, the undersigned, do certify that we witnessed the said execution, and that the same was conducted and performed in conformity to the provisions of law of this state concerning capital punishment, and of the said sentence.

In witness whereof, we have at the said jail subscribed our names hereto, this day of in the year one thousand eight hundred and

(Signed)

A. B., Sheriff.

C. H. D., Justice of Supreme Court.

E. B., District Attorney.

C. D., &c.

No. 98.

ADMISSION OF RECEIPT OF PAPERS FOR SERVICES.

(Title of action.)

Received summons and complaint and order to hold to bail and copies to serve this day of 18

A. B., Sheriff,

by E. F., Deputy.

No. 99.

UNDERTAKING ON ARREST.

See § 333.

(Title of action.)

The above defendant having been arrested by the sheriff of the county of and being now in his custody, under and pursuant to an order made by the Hon. C. H. D., a justice of the

supreme court of this state, (or county judge of the county of)
 requiring the defendant to be held to bail in the sum of dollars:
 Now, therefore, we, E. F., hide and leather dealer, residing in
 in said county, and G. H., gentleman, residing in the same place, do
 undertake in the said sum of that the defendant shall at all
 times render himself amenable to the process of the court during the
 pendency of this action, and to such as may be issued to enforce the
 judgment therein. Dated. 187

E. F.

G. H.

No. 100.

AFFIDAVIT OF JUSTIFICATION.

See § 333.

(Title of action.)

County of ss. E. F. and G. H., the surety in the above
 undertaking being severally duly sworn, each for himself, deposes
 and says that he is a resident and house holder (or freeholder) within
 the state, and that he is worth the sum of (the sum mentioned in the
 order of arrest) over and above all debts and liabilities and exclusive
 of property exempt from execution.

Subscribed and sworn before
 me, this day of

E. F.

G. H.

No. 101.

CERTIFICATE OF ACKNOWLEDGMENT.

See § 333.

(Title of action.)

County of ss. Personally appeared before me this
 day of 187 E. F. and G. H., to me known to be the surety
 described in, and who executed the within undertaking, and who
 severally acknowledged that they executed the same for the uses and
 purposes therein mentioned.

A. B., County Judge of county.

No. 102.

CERTIFICATE TO COPY DELIVERED TO ATTORNEY.

See § 333.

I certify that the within is a true copy of the undertaking, taken
 on the arrest of the defendant in the within entitled action.

Dated 187

A. B., Sheriff of county.

No. 103.

NOTICE OF JUSTIFICATION OF BAIL.

See § 339.

(Title of action.)

Sir: Take notice that the bail in the undertaking, taken on the arrest of the defendant in this action, will justify before the Hon. county judge of county, at his office in on the day of at o'clock in the forenoon.

Dated C. D., Sheriff.

To A. B., Attorney for Plaintiff.

No. 104.

RETURN OF ARREST UNDER ORDER, AND OF HOLDING TO BAIL.

See § 338.

I have arrested the within defendant, pursuant to the within order, and at the same time delivered to him a copy thereof, and of the affidavit on which the order was granted; and have taken from said defendant, the undertaking of E. F., hide and leather dealer, residing in and G. H., gentleman, residing in the same place, a copy of which, duly certified by me, is returned herewith.

Dated 187 A. B., Sheriff of county.

No. 105.

RETURN WHERE THE DEFENDANT MAKES A DEPOSIT INSTEAD OF BAIL.

See § 337.

I have arrested the within defendant, pursuant to the within order, and at the same time delivered to him a copy thereof, and of the affidavit on which the order was granted; and I have received from said defendant the sum of dollars instead of bail, and have deposited the same with the county clerk of county.

A. B., Sheriff of county.

No. 106.

CERTIFICATE OF DEPOSIT OF AMOUNT INSTEAD OF BAIL.

See § 337.

(Title of action.)

The above defendant having been arrested by me, under and pursuant to an order of requiring such defendant

No. 111.

RETURN OF ARREST AND DEATH OF DEFENDANT.

I have arrested the within defendant, and held him in my custody until on the day of 18 when he died by reason of sickness, (or by suicide, or was murdered,) therefore I cannot have the body of the said as I am within commanded. Dated 187 A. B., Sheriff of county.

No. 112.

RETURN OF EXEMPTION FROM ARREST.

See § 301.

I arrested the within defendant, as I am within commanded ; and the said defendant claiming exemption therefrom, by reason of having been duly subpoenaed to attend as a witness upon the trial of a certain cause then pending in the supreme court of this state, between plaintiff, and defendant, on the part of the defendant, and then to be tried at a circuit court, to be held at in said and having been required thereto by me, did make affidavit of such fact, and that he had not been so subpoenaed by his own procurement, with intent of avoiding service of process, I did release the said from such arrest ; and afterwards the said could not be found in my county ; wherefore I cannot have him as I am within commanded. Dated 187 A. B., Sheriff of county.

No. 113.

AFFIDAVIT OF A WITNESS TO OBTAIN DISCHARGE FROM ARREST.

See § 301.

(Title of cause.)

County of ss. A. B., being duly sworn,
deposeth and saith that he has been legally subpoenaed as a witness to
attend before the court of oyer and terminer in and for the county of
now in session at on the trial of an indictment against
C. D., on the part of the people, and that he, this deponent, has not
been so subpoenaed by his own procurement, with intent of avoiding
service of process; and further this deponent saith not.
Sworn before me this day of A. B.
C. D., Sheriff of county.

No. 114.

RETURN OF PRIVILEGE.

At the coming to me of the within order of arrest (or *capias ad satisfaciendum*,) the congress of the United States (or the legislature of the state of New York) was then and still is in session; and that during all that time the within defendant was and is a member of the senate of the United States (or of the assembly of the state of New York,) for the th congressional district of the state of (or for the first assembly district of the county of); wherefore I cannot have the body of the said as I am within commanded.

Dated 187

A. B., Sheriff of county.

No. 115.

THE SAME.

The within named at the delivery of the within order of arrest, (or *capias ad satisfaciendum*, or writ of *ne exeat*,) and until the return day of the said writ, was minister plenipotentiary from the Queen of Great Britain at the government of the United States; wherefore I cannot have his body at the time and place within named, as I am within commanded.

A. B., Sheriff of county.

No. 116.

RETURN UPON AFFIDAVITS BEFORE FILING.

I certify and return, that at the time of the arrest of the defendant in the within entitled cause under the order made therein by Hon. C. H. D. to wit: on 187 I delivered to the said defendant copies of the within affidavits, personally.

A. B., Sheriff of county.

No. 117.

RETURN TO PROCESS THAT THE DEFENDANT CANNOT BE FOUND.

The within defendant cannot be found in my county.

A. B., Sheriff.

This return will be a proper return to all process where the defendant cannot be found, whether it be to a summons, judge's order, attachment, execution, or *ne exeat*.

No. 118.

See §§ 351, 353.

SERVICE OF SUMMONS AND COMPLAINT UPON A SINGLE DEFENDANT.

County of ss. I certify that on the day of
 18 I served the within summons and annexed complaint, upon the
 within named defendant, in in said county, by delivering to
 him, personally, copies thereof.

A. B.

Sheriff of county.

No. 119.

WHERE SEVERAL DEFENDANTS ARE SERVED AT DIFFERENT TIMES.

See §§ 351, 353.

County of ss. I certify that I served the within summons
 and annexed complaint, upon the several defendants therein named,
 by delivering to each of them personally, copies thereof, at the times
 and at the places in said county set opposite their names respectively,
 to wit:

A. B., on the	day of	18	at A.
C. D., “	“	“	“ B.
E. F., “	“	“	“ C.

A. B.,

Sheriff of county.

No. 120.

CERTIFICATE THAT DEFENDANT EVADES SERVICE, ETC.

See § 351, sub. 5.

County of ss. I certify that the within defendant is a
 resident of in said county, and that I have made proper and
 diligent efforts to serve the within summons and annexed complaint
 upon him, but that such defendant cannot be found within my county,
 (or, avoids or evades such service,) so that the same cannot be made
 personally upon him by such proper diligence and effort.

A. B., Sheriff of county.

No. 121.

PROOF OF SERVICE IN SUCH CASE.

See §§ 289, 351, sub. 5.

County of ss. A. B. being sworn, says that on the
 day of he made service of the within summons and annexed

complaint upon the within defendant in said county, in
pursuance of the annexed order, (by leaving copies of such sum-
mons and complaint at the residence of said defendant, with his wife
a person of proper age,) and by putting other copies thereof, properly
folded (or enveloped) and directed to said defendant at his
said place of residence, into the post-office in said and paying
the postage thereon ; and further saith not. A. B.
Subscribed and sworn before me

this day of 187

C. D., Justice of the Peace.

If the officer cannot get into the house, or there is no person who
will receive the papers, insert, in place of the part in brackets, the
following : "affixing the same to the outer door of the residence of
said defendant, the said house being closed," "or admittance being
refused," "or, there being no person of suitable age to receive the same,
or, there being no person of suitable age who would receive the
same.)

No. 122.

CERTIFICATE OF SERVICE OF A SUMMONS OF A CORPORATION.

See § 351, sub. 1.

County of ss I certify that on the day of
18 I served the within summons (and annexed com-
plaint) upon the within named defendants, by delivery to A. B., the
president (or managing agent) of said corporation, personally, copies
thereof, in in said county.

C. D., Sheriff,
by D. E. Deputy.

No. 123.

CERTIFICATE OF SERVICE OF A SUMMONS ON A FOREIGN CORPORATION, WHICH HAS DESIGNATED A PERSON RESIDING IN THE COUNTY ON WHOM PROCESS MAY BE SERVED.

See § 351, sub. 1.

County of ss I certify that on the day of
18 I served the within summons (and annexed complaint) upon the
within defendants, in in said county, by delivering to A. B.,
the person designated by said corporation on whom process issued by
authority of, or under any law of this state, may be served, a copy of
said summons (or copy of said summons and complaint) personally.
A. B., Sheriff of county.

No. 124.

THE SAME, WHERE NO PERSON IS SO DESIGNATED.

See § 351, sub. 1.

County, ss. I certify that not finding any officer of the within named defendants on whom to make services of the within summons; and the said corporation having failed to designate a person on whom such papers might be served, I served the within summons upon the within named defendants by delivery to C. D. a copy thereof personally, on the at in said county; said C. D. at the time being or acting as the agent of the said defendants within this state (or doing business for them within this state.)

A. B., Sheriff.

No. 125.

CERTIFICATE OF SERVICE UPON AN INFANT UNDER FOURTEEN YEARS OF AGE.

See § 351, sub. 2.

County of ss. I certify that on the day of 187 I served the within summons (and annexed complaint) upon the within minor defendant, by delivering to him personally copies thereof, in in said county, and also by delivering at the same time and place like copies, personally, to the father (mother or guardian) of said infant, (or to the person having the care and control of such minor; or to the person in whose service he was then employed, such infant having no father, mother or guardian within this state.)

A. B., Sheriff of county.

No. 126.

THE SAME UPON A LUNATIC AND HIS COMMITTEE.

See § 351, sub. 3.

County of ss. I certify that on the day of 18 I served the within summons upon the within named defendant, by delivering to him, personally, a copy thereof, in in said county; and by delivering a like copy to the committee of said defendant, on the day of in in said county, personally.

A. B., Sheriff of county.

No. 127.

UNDERTAKING OF THE PLAINTIFF TO OBTAIN DELIVERY OF PERSONAL
PROPERTY.

See § 357.

(Title of action.)

Whereas the plaintiff in this cause has commenced (or is about to commence) an action against the defendant for the recovery of certain articles of personal property mentioned in the affidavit of the said plaintiff, to wit:

Now, therefore, we A. B. and C. D. both of merchants, do acknowledge ourselves to be bound in the sum of for the prosecution of the said action for the return of the said property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff. Dated 18

(Signed, acknowledged, and surety to justify as in Nos. 100, 101.)

No. 128.

APPROVAL THEREOF BY THE SHERIFF.

See § 358.

I approve of the sureties in the within undertaking.

E. F., Sheriff of county.

No. 129.

UNDERTAKING BY DEFENDANT WHO REQUIRES RETURN OF THE
PROPERTY.

See § 361.

(Title of action.)

Whereas C. D., the defendant in this cause, requires the return to him of certain personal property taken by A. B., sheriff of the county of in this action, upon the affidavit and order of the plaintiff under the provisions of the Code, for the obtaining possession of personal property, to wit:

Now, therefore, we, E. F. and G. H., farmers, of are bound in the sum of (at least double the value of the property as stated in the plaintiff's affidavit,) for the delivery of such property to the plaintiff, if delivery thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant.

(Signed, acknowledged, and surety to justify, as Nos. 100, 101.)

No. 130.

NOTICE OF CLAIM BY A THIRD PERSON.

See § 361.

(Title of action.)

SIR: Take notice that C. D. claims the property taken by me under the order in this action, and has made affidavit of his title thereto, and right to the possession thereof, and of the grounds of such right and title, and served the same on me, and that I do therefore require to be indemnified by the plaintiff against such claim, and in default of such indemnity, I shall not deliver such property to the plaintiff, nor keep the same.

Dated 18

A. B., Sheriff of county.

To E. F., Esq., Plaintiff's Attorney.

No. 131.

INDEMNITY AGAINST SUCH CLAIM.

See § 363,

(Title of action.)

Whereas C. D. claims to be the owner of, and to have the right of possession of certain personal property which has been taken by A. B., sheriff of the county of upon the affidavit and order of the plaintiff herein, under the provisions of the Code for obtaining possession of personal property, to wit:

Now therefore, we, G. H. and S. K., of merchants, do undertake and agree to indemnify and save harmless the said A. B., sheriff as aforesaid, against such claim.

(Signed, acknowledged, and surety to justify, as in Nos. 100, 101.)

No. 132.

RETURN TO ORDER FOR DELIVERY OF PERSONAL PROPERTY.

County of ss. I certify and return that on the day of, &c., I executed the order indorsed hereon, for the delivery of the personal property mentioned in the within affidavit, by taking possession of the same, (or all thereof to be found in my county, to wit:

) and at the same time I delivered to the defendant (or to the agent of the defendant from whom the possession of the property was taken; or, and the said defendant and his agent from whom the possession of the property was taken not being found, I left at the usual place of abode of the defendant (or said agent) with a person

of suitable age and discretion,) a copy of the within affidavit and order and of the undertaking required in such case, duly approved by me,' (and the defendant having failed to except to the surety therein, and also having omitted to require a return of the said property,)² and no person having made claim thereto, I did, at the expiration of the time prescribed by the statute for seeking such delivery and making such claim, to wit: on the day of 18 deliver the property so taken to the plaintiff, as by the said order I am commanded; and that on the day of 18 I delivered said undertaking to the defendant.

A. B., Sheriff of county.

No. 133.

WHERE THE DEFENDANT EXCEPTS TO THE SURETY.*

After ¹ add: "And the defendant having excepted to the surety therein, and the same having duly justified," and then from ² to the end.

No. 134.

WHERE THE DEFENDANT CLAIMS THE REDELIVERY OF THE PROPERTY.

After ¹ add: And the defendant not having excepted to such bail, claimed the redelivery of the said property by giving to me an undertaking in due form, and the sureties therein having justified, and no other person having made claim to the said property, in due form of law, I redelivered the said property to the defendant, together with the first mentioned undertaking; and the last mentioned undertaking, I delivered to the plaintiff.

No. 135.

WHERE ANOTHER CLAIMS THE PROPERTY AND THE PLAINTIFF INDEMNIFIES.

After ² add: And one E. F. having made claim to said property by affidavit in due form of law, and the plaintiff having given the indemnity required by the Code, I delivered the said property to the said plaintiff, and the first mentioned undertaking to the defendant.

No. 136.

WHERE THE PLAINTIFF REFUSES TO GIVE THE INDEMNITY.

After ² add: And one E. F. having made claim to said property

in due form of law, and the plaintiff neglecting and refusing to give the necessary indemnity after being thereto required, I relinquished the possession of the said property and delivered the said undertaking to the defendant.

No. 137.

UNDERTAKING ON ARREST WHERE PERSONAL PROPERTY IS SECRETED.

See § 345.

(Title of cause.)

This action has been brought to recover possession of the following described personal property, to wit: alleged to be unjustly detained by the defendant, and concealed or removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof; and whereas the said defendant has been arrested in said action by the sheriff of the county of under and pursuant to an order of Hon. C. H. D. a justice of the supreme court of this state, requiring the said defendant to be held to bail in the sum of dollars:

Now therefore, we merchant, and farmer, both residing at in said county, do acknowledge ourselves to be bound in the sum of dollars, for the delivery of said personal property to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. Dated

A. B.
C. D.

(Sureties to acknowledge and justify as Nos. 100, 101.)

No. 138.

RETURN TO AN ORDER FOR THE DELIVERY OF PERSONAL PROPERTY
WHERE NONE OF THE GOODS ARE FOUND.

I have made diligent search, but no part of the within described goods could be found in my county, so that I could make delivery thereof, as I am within commanded.

A. B., Sheriff.

No. 139.

INDORSEMENT OF RECEIPT OF ATTACHMENT AGAINST A FOREIGN
CORPORATION, ETC.

See § 368.

Received 187 at o'clock, P. M.

A. B., Sheriff of county.

No. 140.

CERTIFICATE ON COPY OF ATTACHMENT SERVED.

See § 373.

I certify that the within is a copy of the attachment issued in this action, with all the indorsements thereon. Dated 18

A. B., Sheriff of county.

No. 141.

NOTICE TO CREDITORS OF WHAT ATTACHED.

See § 373.

(Title of action.)

To A. B.

(or, The Insurance Company.)

(or, The Bank.)

Take notice that, by virtue of the warrant of attachment issued in this cause, with a certified copy of which you are herewith served, I attach all the interest of the defendant (in a debt due from you to the said defendant of about \$; or, in and to the shares or capital stock of said bank with the interest, dividends or profits thereon owned by the defendant; or, the claim of the defendant against said insurance company for loss by fire on a policy of insurance by said company issued about, &c.)

Dated 187

A. B., Sheriff of county.

No. 142.

INVENTORY AND APPRAISAL OF PROPERTY ATTACHED.

See § 374.

(Title of action.)

Inventory of the property of the defendant in this cause, so far as the same has come to the hands, possession or knowledge of the sheriff of the county of by virtue of a warrant of attachment issued by the Hon. C. H. D., taken with the assistance of two disinterested freeholders summoned and sworn by the said sheriff to assist in taking the same this day of

A claim against A. B., in favor of the defendant, for \$100,

\$100 00

A claim against C. D., for \$250, but of no value, as C. D., is insolvent.

A claim against the Insurance Company upon a policy of insurance to the defendant, dated on or about 187 for \$ on which there is claimed to be due \$1,000, but which the company repudiate.

A house and lot on street, lately occupied by the defendant, 700 00
 One bay horse, 50 00
 One mahogany sofa, 25 00

(Signed) E. F. } Appraisers.
 C. D. }

A. B., Sheriff of county.

No. 143.

OATH OF APPRAISERS ANNEXED.

County of ss. E. F. and C. D., the above named appraisers, being severally duly sworn, each for himself says that he will well and truly make a full and just inventory, and well and truly appraise the property of the defendant in the above entitled cause seized by the sheriff of county by virtue of the attachment in said cause, according to the best of his ability.

Subscribed and sworn before me E. F.
 this day of 187 C. D.

A. B., Sheriff of county.

No. 144.

FORM OF THE OATH ADMINISTERED.

You and each of you shall well and truly make a full and just inventory, and well and truly appraise the property of the defendant seized by the sheriff of county by virtue of the attachment issued against him at the suit of according to the best of your ability. So help you God.

No. 145.

CERTIFICATE INDORSED ON INVENTORY.

I certify that the within is the inventory and appraisal of the property of the defendant within named, attached by me under and pursuant to the warrant of attachment issued by the Hon. C. H. D.

Dated 187 A. B., Sheriff of county.

No. 146.

BOND OF INDEMNITY UPON A CLAIM TO ATTACHED PROPERTY.

(Penal part as No. 13.)

Whereas an attachment has been issued in an action in the supreme court in favor of the above named A. B., against C. D., upon which the above named A. C., sheriff of the said county of _____ has attached and taken into his custody certain goods and chattels, viz:

And whereas G. H., of _____ or some other person, claims the same, (and a jury has, by their inquisition, found the said property in said claimant:)

Now therefore, the condition of this obligation is such, that if the above bounden A. B., shall and does well and sufficiently indemnify, save and keep harmless the said A. C., sheriff as aforesaid, of, from and against the said claim, and shall pay all costs and damages that the said A. C. may incur or be put to in consequence of such claim, and shall pay off, discharge and cancel all judgments, damages and costs that may be rendered against said A. C., by reason of such seizure, then this obligation to be void, otherwise to be and remain in full force and virtue.

Sealed and delivered in the
presence of _____

(Add affidavit of justification and acknowledgment as Nos. 100, 101.)

No. 147.UNDERTAKING BY PLAINTIFF TO PROSECUTE ACTIONS CONCERNING
ATTACHED PROPERTY.

See § 377.

(Title of action.)

Whereas A. B., sheriff of the county of _____ has attached a certain claim of the defendant against C. D., concerning which it is necessary to commence one or more actions; and whereas said sheriff has consented that such action may be prosecuted by the above named plaintiff, or under his direction:

Now therefore, we _____ of _____ merchants, undertake that the plaintiff will indemnify said A. B., sheriff as aforesaid, from all damages, costs and expenses on account of said actions, or either of them, not exceeding the sum of \$250 in any one action.

Dated 187 _____

! (Surety to sign, justify and acknowledge as Nos. 100, 101.)

No. 148.

EXECUTION ON A JUDGMENT WHERE PROPERTY WAS ATTACHED.

See § 379.

The people of the State of New York to A. B., sheriff (or late)
 sheriff of the county of Greeting:

Whereas an attachment was duly issued by the Hon. C. H. D., one
 of the justices of the supreme court at the suit of E. F., against G. H.
 to the said A. B., as sheriff of said county, and that such proceedings
 were thereupon had that the said sheriff seized and attached certain
 real and personal property of the defendant, to wit:

And whereas the said A. B., still holds the same by virtue of the
 said warrant and seizure. And whereas judgment was duly rendered
 in the supreme court of this state in the action commenced by said
 attachment in favor of the plaintiff and against the defendant for
 dollars and cents recovery and dollars and cents costs,
 the judgment roll whereof was filed in county on the day of
 187 , which judgment was docketed in said county of on
 the day of 187 ; and whereas there is now actually due on said
 judgment with interest thereon from the day of

You are therefore required to satisfy the said judgment of the real
 and personal property so attached and held by you and to return this
 execution with your proceedings thereon to the clerk of the county
 of within sixty days after your receipt of the same.

Dated

E. R.

Plaintiff's Attorney.

No. 149.

RETURN TO THE ATTACHMENT.

See § 381.

County of ss. I have executed the within writ, by attaching
 all the property of the defendant to be found in my county, and
 making and filing an inventory and appraisal thereof in due form,
 and taking possession of such property; that one A. B., having made
 claim to the same (or to the following, to wit:) in due for
 of law, and a jury duly summoned and sworn by me by their inquest
 having found the title to the said property in the said claimant, and
 the attaching creditor having neglected and refused, after being duly
 thereunto required, to indemnify me against said claim, I released to
 the said claimant the property so claimed by him, (or, the attaching
 creditor having indemnified me, I refused to deliver up such property

to such claimant, notwithstanding such finding;) and that the perishable property mentioned in the said inventory was by me sold in due form of law under the direction of the officer issuing the warrant for the sum of over and above my expenses, allowed by such officer; and that the vessel (share or interest therein) mentioned in such inventory was delivered up by me under and pursuant to the direction of the said officer, (or was sold by me under the direction of said officer, at the time and place and in the manner prescribed by said officer, for the sum of over and above my expenses allowed by the said officer;) and that I have collected of the debts due the said defendant upon the claim against A. B., for the sum of and that I commenced an action against C. D., in the supreme court on the claim against him, and that judgment was obtained thereon, but nothing has been collected upon the execution issued therein; and that I have retained possession of the property and the proceeds of such sales, and the moneys realized on said debts until the issuing and delivery to me of an execution on the judgment in this cause; and that I have applied the amount of such sales, deducting my expenses first allowed by such officer, upon said execution to the amount of and that I have levied upon the property so attached, and have sold the following, to wit: for which I have realized the balance of the said execution, besides my fees; and that I have delivered the balance of said property to the defendant.

Dated 187

A. C., Sheriff.

No. 150.

WHEN THE WARRANT HAS BEEN DISCHARGED.

See § 381.

State as above, all that has been done under the attachment and then add: "that having been served with an order of the court, discharging the said warrant of attachment, I released the said property from said attachment."

Dated 187

A. B., Sheriff.

No. 151.

RETURN TO ATTACHMENT AGAINST AN ABSCONDING, CONCEALED OR
NONRESIDENT DEBTOR, UNDER THE R. S.

See § 384.

As in No. 149, so far as proceedings conform, and add: "that having been served with the order of the court appointing A. B.,

C. D. and E. F., trustees of the property and effects of the defendant, and also with the certificate of the clerk of the court that they had duly filed the security required by law and taken upon themselves the duties of such trustees, I have delivered over to said trustees all the property, money and effects of the defendant in my hands, received by me under and pursuant to such attachment."

No. 152.

RETURN TO WARRANT FOR SEIZURE OF SHIPS.

See § 395.

In pursuance of the within attachment, I attached and seized the vessel named within on the day of 187 together with her tackle, apparel and furniture, and she is now and ever since hath been safely kept by me as I am within commanded. And that at the time of such seizure I had no other warrant against the said vessel; but that after said seizure to wit, on the day of I received a warrant of attachment against the same vessel, issued by the Hon. C. H. D., and in favor of

Dated 187

A. B., Sheriff.

No. 153.

INVENTORY ANNEXED.

See § 395.

A just and true inventory made and signed by me, of all the property seized by virtue of the annexed warrant; that is to say, one sloop called the with the following tackle, apparel and furniture, to wit:

Dated 187

A. B., Sheriff.

No. 154.

NOTICE OF SALE OF VESSEL UNDER ORDER OF OFFICER.

See § 399.

Sheriff's Sale.

County of ss. By virtue of a writ of attachment issued by Hon. C. H. D., a justice of the supreme court of this state, to me directed and delivered for execution, against the sloop her tackle, apparel and furniture, and also of the order of the said justice directing the sale of the said vessel, her tackle, apparel and furniture, I shall expose the same for sale at, &c., on, &c.

Dated 187

A. B., Sheriff.

No. 155.

REPORT OF SALE UNDER ORDER.

See § 399.

In the matter of the ship (or sloop)
 attached under a warrant issued on the
 application of

In pursuance of the statute in such case made and provided, I, the sheriff of _____ county, to whom the warrant of attachment in the above entitled matter was directed and delivered for execution, do certify and return to the Hon. C. H. D., justice of the supreme court of this state, by whom the said warrant was issued, that in pursuance of the said warrant, and of the order made by the said justice, bearing date the _____ day of _____ I sold the said vessel, her tackle and apparel, at public auction, at, &c., on, &c., after having first duly advertised the same for sale, in the manner provided by law; and that the said property was then and there sold for the sum of _____ that being the highest sum bid therefor, and that I have received the amount thereof and hold the same subject to the order of the said justice.

Dated 187 _____

A. B. Sheriff of _____ county.

No. 156.

RETURN TO THE ATTACHMENT.

See § 399.

I certify and return that in pursuance of the attachment hereto annexed, I seized the vessel, her tackle, furniture and apparel, and made and returned an inventory thereof, in due form of law, to the Hon. C. H. D., the justice of the supreme court issuing such warrant, and retained the property seized in my possession; that in pursuance of the order of said justice I sold the said vessel, her tackle, apparel and furniture, in the manner prescribed by law; and that after having retained my fees and expenses in seizing, preserving, watching and selling such vessel, allowed by said officer, I paid, out of the balance, to the several attaching creditors entitled thereto, according to the distribution thereof made by said officer, as follows:

To A. B., the sum of _____

To C. D., the sum of _____

And there remaining a surplus of _____ in my hands, after paying all the liens aforesaid, after deducting my commissions thereon allowed by such officer, I paid such surplus to _____ the owner of said vessel.

Dated 187 _____

A. B., Sheriff of _____ county.

No. 157.

INDORSEMENT ON THE ATTACHMENT.

The execution of the within attachment will appear by the schedule hereto annexed.

A. B., Sheriff.

No. 158.

RETURN TO ATTACHMENT WHERE THE VESSEL IS DISCHARGED.

See § 397.

I seized the within named vessel as I am within commanded, and kept her safely, until I was served with the order of discharge made by the Hon. C. H. D., justice of the supreme court, by whom the within warrant was issued, and that thereupon I released and discharged said vessel, her apparel and furniture.

Dated 187

A. B., Sheriff of county.

No. 159.

BAIL BOND ON ARREST ON NE EXEAT.

See §§ 401, 403.

(Penal part as No. 13.)

Whereas, the said has been arrested under and by virtue of a writ of ne exeat issued out of and under the seal of the supreme court of this state, by which the said sheriff was required to hold the said to bail in the sum of dollars: Now therefore, the condition of the said obligation is such that if the said shall go or depart, or attempt to depart from or beyond the said state, without the leave of such court, then the said and each of them will pay or cause to be paid unto the said sheriff as aforesaid, the said sum of dollars; but if the said shall not go or depart, or attempt to go or depart from or beyond the said state without leave of such court, then and in that case this obligation shall be void and of no effect; otherwise to remain in full force and virtue.

Signed, sealed and delivered

in the presence of

(To be signed, and affidavit of justification and acknowledgement as Nos. 100, 101.)

No. 160.

AFFIDAVIT OF THE SHERIFF TO COPY OF BOND.

See § 405.

(Title of action.)

County of ss. A. B. sheriff of county, being sworn,
says that the within is a true copy of the bond taken by him on the
arrest of the defendant therein named, and now in his possession,
with all the indorsements thereon.

Subscribed and sworn before me,
this day of

A. B.

No. 161.

RETURN TO NE EXEAT.

I have arrested the within defendant, and have him now in the
common jail of county, for want of bail.

A. B., Sheriff of county.

No. 162.

RETURN WHERE THE DEFENDANT HAS BEEN LET TO BAIL.

I have arrested the defendant, and have taken from him a bond
with as his surety in the penalty marked on the writ.

A. B., Sheriff.

No. 163.

ADMISSION OF THE RECEIPT OF THE EXECUTION.

See § 410.

SUPREME COURT.

A. B.	}	Execution for \$	on a judgment rendered
ag't.		and docketed in	county, with directions indorsed
C. D.	}	to levy and collect \$	and interest from

besides fees, (or summons and complaint and copies,) dated
Received by me this day of 18 at
o'clock.

E. T., Sheriff of county,
by C. D., Deputy Sheriff.

Or, if endorsed on a copy of the execution:

Received an execution of which the within is a copy, this
day of 187

A. B., Sheriff,
by C. D., Deputy.

No. 164.

INDORSEMENT OF RECEIPT OF EXECUTION.

See § 410

Received 18 at o'clock, p. m.
A. B., Sheriff of county.

No. 165.

SHERIFF'S RECEIPT FOR MONEYS RECEIVED FROM A PERSON INDEBTED
TO THE JUDGMENT DEBTOR.

See § 421.

(Title of action.)

Judgment docketed 18 for dollars, in
county; and an execution issued thereon to the sheriff of county,
where a transcript of such judgment has been filed, with directions
endorsed to collect the sum of dollars and interest from
besides fees.

A. B., Plaintiff's Attorney.

Received from C. D., the sum of dollars, to apply on the above execution, now in my hands, in pursuance of section two hundred and ninety-three of the Code.

Dated 187

E. F., Sheriff.

No. 166.

INDORSEMENT OF LEVY.

Levied this day of 18 at o'clock,
A. M., on the following property, under and by virtue of the within
execution on the premises of the defendant in to wit:

A. B., Sheriff,
by D. E., Deputy.

No. 167.

WHEN ARTICLES ARE TOO NUMEROUS TO ENDORSE ON EXECUTION.

(Title of action.)

Levied this day of 18 at
o'clock, P. M., on the following property, in the possession of
the defendant, under and by virtue of the within execution, to wit:

A. B., Sheriff of county.

No. 168.

INDORSEMENT OF THE EXECUTION IN SUCH CASE.

I have levied on the property mentioned in the annexed schedule, under the within execution, as therein stated.

No. 169.

RECEIPT TO THE OFFICER FOR PROPERTY LEVIED ON.

See § 443.

(Title of action.)

Execution for and interest from
besides sheriff's fees ; received by me 18 for execution.

I have levied upon the following property upon the premises of the defendant and in his possession of under said execution, to wit :

C. D., Sheriff of county.

I hereby acknowledge that I have received the above described property, so levied upon by the sheriff of county, from said sheriff, and hereby promise and undertake to return the same and every part thereof to the said sheriff on demand, or pay the above judgment and sheriff's fees.

Dated, &c.

(Signed) A. B.

No. 170.NOTICE TO PARTY OF CLAIM TO PROPERTY, AND OF CALLING JURY TO
TRY SUCH CLAIM.

(Title of action.)

Take notice that A. B. makes claim to the property levied on (or attached) by me under the execution (or attachment) issued out of the supreme court in favor of C. D. against E. F., and that I shall proceed to try the claim of the said A. B. before a jury to be summoned by me for that purpose at, &c., on, &c.

Yours, &c.,

By A. C., Sheriff of county.

To A. B., Claimant,
C. A., Plaintiff's Attorney,
E. F., Defendant.

No. 171.

OATH OF JURORS ON CLAIM OF PROPERTY.

See § 376, 446.

You and each of you do swear that you will well and truly try the claim of A. B. to the property levied (or attached) by the sheriff of _____ county, under the execution (or attachment) in favor of C. D. at the suit of E. F., and true inquisition make according to the evidence. So help you God.

No. 172.

OATH TO WITNESS.

See §§ 376, 446.

You do swear that the evidence you shall give to the jury, touching the claim of A. B. to the property levied on (or attached) by the sheriff of _____ county, under the execution (or attachment) in favor of C. D. against E. F. shall be truth, the whole truth, and nothing but the truth. So help you God.

No. 173.

INQUISITION OF JURY UPON CLAIM TO PROPERTY.

(Title of action.)

We whose names are hereto signed, being a jury summoned and sworn by the sheriff of _____ county to try the claim of A. B. to the property levied on (or attached) by the said sheriff of _____ county under the execution (or attachment) in favor of C. D. against E. F., to wit, one horse, &c., _____ do upon our oaths say that the title to the said property is (or is not) in the said A. B.

Witness our hands and seals, at, &c.

Jurors.

Jurors.

(L. s.)

(L. s.)

(L. s.)

(L. s.)

(L. s.)

(L. s.) &c.

G. H., Sheriff of _____ county.

No. 174.

BOND OF INDEMNITY AGAINST A LEVY.

See § 446.

(The penal part as No. 13.)

Whereas _____ has issued an execution on a judgment in the supreme court in his favor against _____ for _____ dollars to the said _____ as sheriff of _____ county; and whereas*

Now therefore, the condition of the above obligation is such, that if the above bounden shall well and truly keep and save harmless and indemnify the said sheriff as aforesaid, and all and every person and persons aiding and assisting him in the premises, of and from all harm, loss, trouble, damages, costs, suits and actions, judgments and executions that shall or may at any time arise, come or be brought against him, them or any of them; as well for the levying and making sale under and by virtue of such process, of any of said goods, as for entering any shops, stores, dwelling, or other houses or buildings, for the purpose of taking said goods and chattels; and shall pay off, cancel and discharge any judgment, claim or demand that may be recovered, arise, or may be made against the said as such sheriff, or of the said persons so aiding or assisting, or either of them, then this obligation to be void, otherwise to remain in full force.

Signed, sealed and delivered
in the presence of

(L. S.)

(L. S.)

(L. S.)

(To be signed, and affidavit of justification, and certificate of acknowledgement, as in Nos. 100, 101.)

No. 175.

WHEN THE LEVY IS MADE BY DIRECTION OF THE PLAINTIFF.

The same as the last, inserting after the asterisk: "by direction of said plaintiff, said as such sheriff, by his deputy, has seized and levied on personal property, consisting of

No. 176.

WHERE A JURY HAS BEEN CALLED TO TRY THE CLAIM.

The same as No. 174, inserting after the asterisk; "the said as such sheriff, did levy upon certain goods and chattels, under such execution, supposed by him to belong to said defendant; but which were claimed by and a jury duly called for that purpose having found that the title to such property was in the said claimant, and the said plaintiff refusing to assent that such property be released from such levy, but insisting that such sheriff should retain such levy under his execution, and that he should sell the property:"

No. 177.

WHERE GIVEN BEFORE TRIAL OF CLAIM.

The same as No. 174, inserting after the asterisk: "the said

as such sheriff, did levy upon certain goods and chattels, under and by virtue of such execution, supposed by him to belong to said defendant, but which are now claimed by or some other person :”

No. 178.

UNDERTAKING OF INDEMNITY AGAINST A LEVY.

Whereas an execution has been issued by the clerk of the county of on the day of 187 to the sheriff of said county, upon a judgment rendered before a justice of the peace of said county, on the day of in favor of against for and docketed in his office ; and, whereas the defendant has in his possession certain personal property, to wit ; which he claims to belong to some other person :

Now therefore, in consideration that the said as such sheriff, by himself or his deputy, or other officer, shall levy upon the said and shall sell the same under said execution ; and, also, in consideration of to us paid, we do hereby agree to indemnify and save harmless the said as such sheriff as aforesaid, and his deputies and officers, and all persons executing or assisting in executing said execution, from any costs, expenses, judgments or damages, he or they or either of them may suffer, in consequence of levying upon or selling said and also that we will pay off and discharge all judgments, damages and costs, that said or any of his deputies, may or shall become liable to pay by reason of such levy or sale. Dated.

(To be signed and affidavit of justification and certificate of acknowledgment annexed, as in Nos. 100, 101.)

No. 179.

NOTICE OF SALE OF PERSONAL PROPERTY.

See § 484.

Sheriff's Sale.

County of ss. By virtue of an execution (or of several executions) issued out of the supreme court of this state and to me directed and delivered, I have levied on and taken all the right, title and interest of of, in, and to the following property, to wit :
 which I shall expose to sale at public vendue, as the law directs, on the day 18 at o'clock in the noon, at the public house kept by in the town of in said county. Dated 187

A. B., Sheriff.

No. 180.

BILL OF SALE OF PERSONAL PROPERTY ON EXECUTION.

(Title of action.)

A. B. has this day bought at sheriff's sale, under an execution in the above entitled cause, the following described property, to wit:

One bay horse,	\$50
One single harness,	10
One single wagon,	30
	\$90

Received ninety dollars in full of the above purchase.

Dated 18

A. B., Sheriff of county.

No. 181.

BILL OF SALE OF STOCKS ATTACHED.

See § 399, sub. 2.

(Title of action.)

By virtue of the attachment, issued in the above entitled cause by Hon. C. H. D., a justice of the supreme court, dated 187 I attached and seized certain stocks, and the dividends thereon, and certain deposits, moneys, and credits of the defendant, which I exposed for sale, as the law directs, on the at, &c., at which sale, the following stocks, funds and rights were sold to for the following prices, to wit:

Ten shares in the capital stock of the insurance company
for \$

Five shares in the capital stock of the Bank

Dividends now due thereon,

A deposit in said bank to the credit of the defendant, of §

Received payment in full of the amount of said purchase.

Dated 187

A. B., Sheriff.

No. 182.

RETURN TO EXECUTION OF NULLA BONA.

See § 428.

The defendant has no goods or chattels, lands or tenements, within my county, whereof I can make the amount of the within execution, or any part thereof. Dated

A. B. Sheriff of county.

NO. 183.

WHERE PART IS MADE AND NULLA BONA FOR THE RESIDUE.

See § 428.

I have made the sum of part of the moneys directed to be made upon the within execution ; and I can find no goods or chattels, lands or tenements, of the within defendant in my county, whereof I can make the balance of the said execution.

A. B., Sheriff of county.

No. 184.

WHERE THE WHOLE IS MADE.

See § 428.

I have made the amount of the within execution out of the goods and chattels, lands and tenements of the within defendant, which I have ready at the day and place within mentioned, to render to the within plaintiff, as I am within commanded, (or have paid the same to the within plaintiff) (or have paid the same into court.)

Dated 187

A. B., Sheriff of county.

(Or, "satisfied.")

A. B., Sheriff of county.

No. 185.

WHERE GOODS REMAIN UNSOLD FOR WANT OF BIDDERS.

See § 423.

I have levied on goods and chattels of the defendant, under the within execution, which remain on hand for want of bidders ; therefore I cannot have the moneys at the day and place within mentioned, as I am within commanded.

A. B., Sheriff of county.

No. 186.

NULLA BONA WHERE BUT ONE OF TWO JOINT DEBTORS WERE SERVED.

See § 439.

I can find no goods or chattels, lands or tenements of the within defendant in my county ; and no goods or chattels of the defend

ant owned by him jointly with the said of which I can make the amount of the within execution, or any part thereof.

Dated A. B., Sheriff of county.

No. 187.

NULLA BONA AGAINST AN EXECUTOR OR ADMINISTRATOR.

The within defendant has no goods or chattels, which were of the within named deceased at the time of his death, in his hands to be administered in my county, whereof I can cause to be made the damages within mentioned, or any part thereof.

A. B., Sheriff of county.

No. 188.

RETURN TO EXECUTION STAYED BY APPEAL BEFORE LEVY.

See § 428.

I certify and return, that after the delivery of the said execution to me, and before levy thereunder, the execution of the same was stayed, by appeal; wherefore I could not have the moneys within mentioned at the return day of such execution, as I am within commanded.

A. B., Sheriff of county.

No. 189.

WHEN STAYED BY APPEAL OR INJUNCTION AFTER LEVY.

After the receipt of the within execution by me, I levied, in due form of law, upon certain goods and chattels of the defendant; but before sale thereof, the execution was stayed by appeal, (or by injunction;) therefore I could not make the within moneys by the day within mentioned; nevertheless I have the said goods and chattels in my custody, to answer to the within execution when the said appeal shall be determined (or said injunction is removed.)

A. B., Sheriff of county.

No. 190.

RETURN WHERE JUDGMENT OR EXECUTION IS VACATED.

After the receipt of the within execution by me, I levied, in due form, upon certain goods and chattels of the defendant; but before sale, was served with an order of this court, duly certified by the clerk

of county, vacating the said judgment (or setting aside the said execution.) Therefore I have released the said goods and chattels from the said levy, and cannot have the within moneys at the day and place within mentioned, as I am within commanded.

A. B., Sheriff of county.

No. 191.

RETURN OF LEVY AND SALE, WHEN THERE IS A CONTROVERSY AS TO
TITLE TO THE PROPERTY.

See §423.

On the receipt of the within execution, I levied, in due form of law upon the following property, then in the possession of the defendant, in my county, to wit: one bay horse, &c.; and that on the day of at in said county, I sold the following part of such property, to wit: whereby I realized sufficient to pay the within execution, with interest and fees of levy and sale; and thereupon I returned to the defendant the balance of said property, to wit:

Dated 187

A. B., Sheriff of county.

No. 192.

WHERE GOODS LEVIED ON ARE REPLEVIED.

See § 441.

After the coming to me of the within execution, I levied, in due form of law, upon certain goods and chattels of the within defendant; but before the sale thereof, the same were replevied and taken out of my custody by one of the coroners of the within county, at the suit of and I can find no other goods or chattels, lands or tenements of the within defendant in my county, whereof to make the amount of the within execution, or any part thereof.

A. B., Sheriff of county.

No. 193.

RETURN OF RESCUE.

See § 45.

After the delivery of the within execution to me for service, I proceeded to execute the same by levying upon certain goods and chattels of the defendant, at his dwelling in and while taking the same into my possession, under and by virtue of the within execution, I was violently resisted by the said defendant and one and then and

there aiding and abetting the said defendant; who then and there violently rescued the said goods from me, and I have not been able to find the same in my county; and I can find no other goods or chattels, lands or tenements of the within defendant in my county, whereof I can make the amount of the within execution, or any part thereof.

A. B., Sheriff of county.

No. 194.

RETURN OF LOSS OF GOODS BY FIRE, ETC.

See § 443.

By virtue of the within execution, I levied upon certain goods and chattels, of the within defendant, and took the same into my custody; but that before the same could be sold, they were casually destroyed by fire (or stolen) without fault or neglect on my part; wherefore I cannot have the moneys within mentioned, as I am within commanded.

A. B., Sheriff of county.

No. 195.

RETURN WHERE THE MONEYS REALIZED HAVE BEEN APPLIED TO THE PAYMENT OF OTHER LIENS.

See §§ 45, 47.

I levied on certain goods and chattels of the defendant, under and by virtue of the within execution, and duly sold the same; on (or after) such sale, I was duly notified that had a lien and claim upon the said goods and chattels to the amount of \$ for work and labor bestowed upon the same; and that I paid and discharged said lien, and have applied the balance of the proceeds of said sale, to wit: \$ on this execution; and I can find no other goods or chattels, lands or tenements of the defendant, whereof I can make the balance of the within execution, or any part thereof.

A. B., Sheriff of county.

No. 196.

NOTICE OF SALE OF REAL ESTATE.

See § 501.

Sheriff's Sale.

County of ss. By virtue of an execution, issued out of the supreme court of this state, against the goods and chattels, lands and tenements of I have seized all the right and title which the said

had on the day of of, in, and to the following described premises, which I shall expose for sale, as the law directs, at, &c., to wit: all that certain, &c.

Dated 187

No. 197.

POSTPONEMENT OF SALE.

See §§ 482, 488.

The sale, pursuant to the above notice, is postponed until the day of next, at the same hour and place.

Dated 187

A. B., Sheriff.

No. 198.

OATH OF JURORS TO APPRAISE HOMESTEAD.

See § 499, sub. 3.

You, and each of you, do swear that you will well and truly appraise the homestead of situate in the town of in the county of and that if in your opinion the same is worth more than \$1,000, then that you will say whether the same can be conveniently divided or no; and if yea, that you will fairly and honestly set off to the said so much thereof, with the dwelling, as shall in your opinion be worth \$ 1,000, and no more; so help you God.

No. 199.

APPRAISAL.

(Title of action.)

We, whose names are hereto subscribed, having been summoned and sworn by the sheriff of the county of to appraise the homestead of situate in the town of in said county; and if in our opinion the same are worth more than \$1,000, then that we say whether the same can be conveniently divided or no; and if yea, that we set off to the said so much thereof as shall be worth \$1,000, and no more; do upon our oaths say that the said premises are worth not to exceed the sum of \$1,000, (or exceed the sum of \$1,000, to wit, the sum of \$1,800, and that in our opinion the same cannot be conveniently divided) or can be conveniently divided; and that we have set off to the said the following described part thereof, including the dwelling, which, in our opinion, is worth the sum of \$1,000, to wit:

In witness whereof, we have hereto set our hands and seals this day of 187

Jurors.

(L. S.)

(L. S.) &c.

A. B., Sheriff.

No. 200.

NOTICE TO DEFENDANT WHEN PREMISES CANNOT BE DIVIDED.

(Title of action.)

I certify that the within is a copy of the appraisal of the jurors, summoned and sworn by me to appraise the value of the homestead owned and occupied by you; and you will take notice, that unless you pay to me the surplus over the said sum of \$1,000, to wit, the sum of \$800, within sixty days from the receipt hereof, that the premises will be sold by me, under the execution in this cause.

Dated, &c.

Yours, &c.

A. B., Sheriff of county.

No. 201.

CERTIFICATE OF SALE OF LANDS.

See §§ 504, 544.

I, sheriff of the county of do certify that by virtue of an execution issued out of the supreme court of this state, tested on the day of 187 I was commanded to make of the goods and chattels, lands and tenements of the sum of which lately recovered against for damages and costs, (or by virtue of several executions, describing each separately) and for want of sufficient goods and chattels of the said to make the moneys aforesaid, then that I should cause the same to be made of the lands and tenements of the said whereof he was seized on and for want of sufficient goods and chattels whereof to make the moneys aforesaid, I did seize the following lands, to wit: and having duly advertised the same in the manner prescribed by statute, to be sold on the day of at in said county, I did expose the same for sale at public auction at the said time and place, (in separate parcels) and that the first parcel, as above described, was then and there struck off to for the sum of and that the second parcel, as herein described, was also then and there struck off to the said for the sum of being together the sum of these being the highest sums bid therefor, respectively.

And I, the said sheriff, as aforesaid, do hereby certify that the said sale will become absolute, and the said purchaser will be entitled to a deed of said lands from me, as sheriff aforesaid, at the expiration of fifteen months from the day of said sale, viz: the day of 187 unless the same shall be, before that time, redeemed agreeably to the provisions of the statutes in such case made and provided.

A. B., Sheriff of county.

No. 202.

DEED ON SALE OF LEASEHOLD ESTATE.

See § 405.

This indenture, made this day of 18 between sheriff (or late sheriff) of the county of of the first part, and of the second part:

Whereas, by virtue of a certain execution issued out of the supreme court of this state, upon a judgment therein, wherein was plaintiff, and was defendant, tested on the day of 18 and directed and delivered to the said party of the first part, as such sheriff, for execution; by which he was commanded, that of the goods and chattels of the said defendant, he should make the amount of the said execution, and for want of sufficient goods and chattels whereof to make the same, then that he should make the deficiency thereof of the lands and tenements and chattels real, whereof the defendant was seized on the day of 18 in whose hands soever the same might be; and, whereas, for want of goods and chattels sufficient to make the amount of the said execution, the said sheriff seized all the right, title, and interest, which said defendant had of, in, and to the premises hereinafter described, and did, thereupon, advertise the same to be sold under and pursuant to such judgment and the said execution thereon, at the public house kept by in the town of in said county, on the day of 18 at o'clock in the noon, by causing a notice thereof to be published in a public newspaper published in said county, once in each week for six weeks successively next preceding said day, and by affixing up in three public places in the said town, where the said premises are situated, and where the same were advertised to be sold on the day of 18 printed copies of said notice; and that at the time and place aforesaid, the said premises were exposed for sale at public vendue, and were then and there struck off to the party of the second part, for the sum of dollars, he being the highest bidder therefor; and, whereas, the right, title and interest of the

defendant of, in, and to the said premises, consists of a leasehold estate, or interest therein, of which there was not, at the time of the said sale, five years unexpired term of said lease :

Now, this indenture witnesseth, that the said party of the first part, by virtue of the said judgment and execution, and in pursuance of the statute in such case made and provided, and in consideration of the sum of money so bid, as aforesaid, to him duly paid, hath sold, and by these presents, doth grant and convey unto the said party of the second part, all the estate, right, title and interest, which the said defendant had on the day of or at any time afterwards, of, in, and to all

To have and to hold the said above mentioned and described premises unto [the said party of the second part, his heirs and assigns, for and during the remainder of the said unexpired term, as fully and as absolutely as the said party of the first part, as sheriff of the said county can convey the same by virtue of the said judgment and execution, and the laws relating thereto.

In witness whereof the said party of the first part has set his hand and seal the day and year first above written.

Signed sealed and delivered
in the presence of

C. D., Sheriff,
by A. H., Deputy.

No. 203.

CERTIFICATE OF ACKNOWLEDGMENT.

County of ss. Personally appeared before me this day of the above named A. H., to me known to be the person who executed the foregoing deed, as deputy of the sheriff of said county, and who acknowledged that he executed the same for the uses and purposes therein mentioned.

R. B. M.,
Recorder of city of

No. 204.

CERTIFICATE ON REDEMPTION BY THE JUDGMENT DEBTOR, GRANTEES, &c. See § 518.

County of ss. I, the sheriff of said county, hereby certify that on the day of 18 A. B., in due form of law, tendered to me the sum of being the amount stated by him to have been bid by the purchaser, on the sale by me of the premises herein-after mentioned, under and by virtue of an execution issued out of the supreme court of this state, against the said A. B., (or against

one C. D.) in favor of E. F., on the day of with interest thereon; and the said A. B., then and there claimed the right to redeem the said premises, as the judgment debtor, (the grantee of the judgment debtor, heir or devisee) and that thereupon I received the moneys so tendered as aforesaid, and have granted to said A. B. this my certificate, in conformity to the statute in such case made and provided. The premises so redeemed, or intended to be redeemed, are described in the certificate of the sale thereof as follows:

In witness whereof, I have hereto set my hand this day of
187

A. B., Sheriff of county.

(To be acknowledged as No. 203.)

No. 205.

CERTIFICATE OF REDEMPTION BY A JUNIOR JUDGMENT CREDITOR.

See §§ 533, 542.

County of ss. I certify that on the day of A. B. tendered to me the sum of and also presented to me a copy of the docket of a judgment in his favor (or in favor of) against C. D., rendered in the supreme court of this state on the day of certified by the clerk of said county, under his seal, (or if the judgment was not in favor of said A. B., then add) also an assignment of said judgment to said A. B., verified by his affidavit, (or the affidavit of a subscribing witness thereto); also, an affidavit of the said A. B., showing the amount due to him on said judgment; and thereupon, said A. B. claimed to redeem, as a judgment creditor, certain premises sold by me, under and by virtue of an execution issued upon a judgment in the supreme court of this state, in favor of against on the day of and which premises are described in the certificate of sale, as follows:

Whereupon I received the moneys so tendered, and the papers so presented by the said A. B., and have granted to him this my certificate in conformity to the statute in such case made and provided.

In witness whereof, I have hereto set my hand this day of
187

A. B., Sheriff of county.

(To be acknowledged as No. 203.)

No. 206.

CERTIFICATE OF REDEMPTION BY A SENIOR JUDGMENT CREDITOR.

See §§ 533, 542.

County of ss. I certify that on the day of A. B.

presented to me a copy of the docket of a judgment, in his favor, (or in favor of) against C. D., rendered in the supreme court of this state on the day of certified by the clerk of said county under his seal (if the judgment was not in favor of A. B., add) also an assignment of said judgment to A. B., verified by his affidavit, (or by the affidavit of a subscribing witness thereto); also an affidavit of purporting to be the agent of said A. B., showing the amount due to said A. B. on said judgment; and thereupon, said A. B. claimed to redeem, as a senior judgment creditor, certain premises sold by me under and by virtue of an execution issued upon certain judgments in the supreme court of this state, in favor of against on the day of and which premises are described in the certificate of sale, as follows:

Whereupon I received the papers so presented, and have granted to him this my certificate (the same as the last.)

No. 207.

CERTIFICATE OF REDEMPTION BY A MORTGAGEE.

See §§ 533, 542.

County of ss. I certify that on the day of A. B. tendered to me the sum of and also presented to me a copy of a mortgage, certified by the clerk of the said county, where the same is recorded together with a copy of an assignment thereof, verified by his affidavit, (or the affidavit of a witness to such assignment) and a copy of the letters of administration, (or letters testamentary) and an affidavit of said A. B. (or E. D., his attorney,) stating the amount due (or to become) due thereon, and thereupon, &c., (as No. 203.)

No. 208.

VERIFICATION OF ASSIGNMENT OF JUDGMENT.

See § 533, sub. 2.

(Title of action.)

County of ss. A. B. being duly sworn, says that the foregoing is a true copy of the assignment or the above entitled judgment, executed by the above named plaintiff to this deponent, and of the whole of such assignment; and further saith not.

Subscribed and sworn before me
this day of

No. 209.

VERIFICATION BY A WITNESS OF ASSIGNMENT OF MORTGAGE.

.See § 533, sub. 2.

County of ss. E. F. being sworn, says, that he was present

when an assignment of the mortgage executed by to and recorded in the office of the clerk of county, was executed by the mortgagee therein to A. B.; and that there was no subscribing witness to such assignment; and he further saith that he has compared the foregoing copy of said assignment with the said original assignment so executed in his presence, and that the above copy is a true copy thereof, and of the whole thereof.

Subscribed and sworn before me
this day of

No. 210.

AFFIDAVIT OF AMOUNT DUE ON JUDGMENT.

See § 533, sub. 3.

County of ss. A. B. being duly sworn, deposeth and saith, that he is the owner and holder of the judgment mentioned in the foregoing copy of docket of judgment, and that there is justly due to this deponent this day, on said judgment, the sum of

Subscribed and sworn before me
this day of

No. 211.

AFFIDAVIT OF AGENT OF AMOUNT DUE ON MORTGAGE.

See § 534, sub. 4.

County of ss. E. F. being sworn, deposeth and saith, that he is the agent for A. B., who is seeking to redeem certain premises from a sale under execution; that there is due to said A. B., on the mortgage held by him, of which a copy is hereto annexed, this day, the sum of over and above all payments, and that there is secured to be paid by said mortgage the further sum of payable with interest from this date, on the day of next.

Subscribed and sworn before me
this day of

No. 212.

AFFIDAVIT OF OVERSEER OF POOR ON SEEKING TO REDEEM.

See § 535.

County of ss. A. B. being duly sworn, says that he is one of the overseers of the poor of under whose direction the warrant and proceedings were issued and taken as mentioned in the annexed

certified copy of order of the court of sessions of the said county of
 and that the real estate sought to be redeemed is held by such
 overseers under such warrant and seizure, and that the same have
 not been discharged, annulled, or reversed, but are now in force.

Subscribed and sworn before me

A. B.

this day of 187

No. 213.

STATEMENT OF REDEMPTION TO FILE IN COUNTY CLERK'S OFFICE.

See § 541.

County of ss. I certify that A. B. has this day redeemed the
 following described premises. from the sale made by me on the
 day of 187 under and by virtue of an execution issued on a
 judgment in favor of said A. B., against C. D., to wit:

That such redemption was made by virtue of a judgment in favor
 of E. F., against C. D., (or a mortgage executed by C. D. to E. F.)
 and by him assigned to said A. B.; that he paid the sum of to
 redeem; and that there was claimed to be due on said judgment (or
 mortgage) at the time of the redemption, the sum of

Dated

A. B., Sheriff of county.

No. 214.

SHERIFF'S DEED.

See §§ 545, &c.

This Indenture, made this day of 187 between A. B.,
 sheriff (or late sheriff) of the county of of the first part, and C. D.
 of the second part:

Whereas, by virtue of a certain execution (describe it as in the cer-
 tificate of sale) directed and delivered to the said sheriff, commanding
 him that of the goods and chattels of the said defendant he should
 cause to be made certain moneys in the said writ specified, and if
 sufficient goods and chattels could not be found, then that he should
 cause the amount so specified to be made of the real estate which
 said defendant had on the day in the said writ mentioned, or at any
 time afterwards, in whose hands soever the same might be, the said
 (late) sheriff did levy on and seize all the estate, right, title, and
 interest, which the said defendant so had of, in, and to the premises
 hereinafter described; and on the day of sold the said premises
 at public vendue, at the public house of in the town of in the
 said county, having first given public notice of the time and place of

such sale by causing a notice thereof to be published in a public newspaper published in said county, once in each week for six weeks successively next preceding said day, and by affixing up in three public places in the said town where the said premises are situated, and where the same were advertised to be sold, on the day of 187 printed copies of said notice; and that at such sale the said premises were struck off to C. D. for the sum of he being the highest bidder therefor, and that being the highest sum bid for the same; (and, whereas, the said premises, after the expiration of fifteen months from the time of said sale, remained unredeemed, and no creditor of the said hath acquired the right and title of the said purchaser, according to the statute;) (or; and, whereas, the said premises, after the expiration of one year from the time of said sale, remained unredeemed by any person entitled to make such redemption within that time; and, whereas, the said C. D., a creditor of the said E. F., having in his own name, (or as assignee, or representative or trustee) a judgment against the said E. F., rendered before the expiration of fifteen months from the time of such sale, and which was a lien and charge upon the premises sold, hath acquired all the right of the said purchaser to said premises, within the time and in the manner and form prescribed by the statute in such case made and provided; and more than twenty-four hours having elapsed since the time of the said redemption, and no other creditor of the said E. F. hath acquired the said right from the said C. D.)

Now, this indenture witnesseth, that the said party of the first part, by virtue of the said writ, and in pursuance of the statute in such case made and provided, and in consideration of the sum of money so bid, as aforesaid, to him duly paid, hath sold, and by these presents doth grant and convey unto the said party of the second part, all the estate, right, title and interest, which the said defendant had on the day of 187 or at any time afterwards, of, in, and to all

To have and to hold the said above mentioned and described premises unto the said party of the second part, his heirs and assigns, forever, as fully and as absolutely as the said party of the first part, as (late) sheriff, as aforesaid, can convey by virtue of the said writ and the laws relating thereto.

In witness whereof, the said (late) sheriff has set his hand and seal hereto the day and year first above written.

Signed, sealed and delivered

A. B., Sheriff, (L. s.)

in the presence of

by A. H., Deputy.

(Certificate of acknowledgment as 203.)

No. 215

NOTICE OF SALE UNDER DECREE OF FORECLOSURE OR PARTITION.

See §§ 552, 558.

(Title of action.)

In pursuance of a decree in this cause, dated
 I shall expose for sale, as the law directs, at the in the on, &c
 the premises described in said decree, as follow: (describe the premises
 as in the decree.)

Dated 187

A. B., Sheriff of county.

C. D., Attorney for Plaintiff.

No. 216.

SHERIFF'S DEED ON SALE UNDER DECREE OF FORECLOSURE.

See § 556.

This Indenture, made this day of between sheriff of the
 county of of the first part, and of of the second part:

Whereas, in and by a certain decree made at a special term of the
 supreme court held at in the town of before on the in
 a certain cause pending in said court, wherein were plaintiffs, and
 were defendants, it was, among other things, ordered, adjudged
 and decreed, that the said sheriff should sell, according to the rules
 and practice of said court, all and singular, the premises described in
 the decree in said cause, at public auction in the said county, according
 to the course and practice of said court.*

And, whereas, the said sheriff having given due notice of the time
 and place of sale, did, on the day of sell at public auction at
 the in aforesaid, the premises described in the said decree;
 and that the same were then and there struck off to the said party of
 the second part for the sum of that being the highest sum bid
 therefore,* and the judgment herein being duly perfected.

Now, this indenture witnesseth, that the said sheriff, in order to
 carry into effect the sale so made by him, as aforesaid, in pursuance
 of the said decree, and in conformity to the statute in such case; and,
 also, in consideration of the premises and of the sum of money so bid,
 as aforesaid, the receipt whereof is hereby acknowledged, hath bar-
 gained, sold and conveyed, and by these presents doth hereby grant,
 assign, sell and convey unto the said party of the second part, his
 heirs and assigns, forever, all (describe the premises as in the decree.)

To have and to hold, all and singular the premises above mentioned
 and described, and hereby conveyed, or intended to be unto the said

party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever.

In witness whereof, the said sheriff, party of the first part, has set his hand and seal the day and year first above written.

Scaled and delivered in _____ A. B., (L. s.)
the presence of _____ Sheriff of _____ county.
(Certificate of acknowledgment as No. 203.)

No. 217.

SHERIFF'S REPORT OF SALE ON FORECLOSURE.

See § 557.

(Title of cause.)

To the Supreme Court of the State of New York:

In pursuance of the decree of sale in this cause, made on the day of 18 by which it was, among other things, ordered and decreed that the mortgaged premises hereinafter described, be sold at public auction by, or under the direction of the sheriff of county, in said county, and that he give public notice of the time and place of such sale, according to the course and practice of this court; and that he execute to the purchaser on such sale a good and sufficient deed of the premises, and that he pay to the plaintiff, or his attorney, out of the proceeds of such sale, the sum of for his costs, and also the amount reported due, with interest thereon, or so much thereof as the purchase money will pay; and that the sheriff take the receipts of the plaintiff, or his attorney, for the amounts so paid, and file the same with his report of sale; and that he bring the surplus moneys arising from the sale, if any, into court. And that if the amount of moneys arising from said sale are insufficient to pay the amount so reported due, that the sheriff specify the amount of such deficiency in his report of sale: I, sheriff of said county, do report, that I advertised said premises to be sold by me, at the public house kept by in the town of in said county, on the day of 18 at o'clock in the noon, as follows: by causing a printed notice thereof to be fastened up in three public places in said town, on the day of 18 and by causing a copy of such notice to be printed once in each week during the six weeks immediately preceding said sale, in a public newspaper printed in said county; which notice contained a description of the mortgaged premises.

And I further report that, on the said day of 18 I exposed said premises for sale at public auction, and that they were

then and there fairly struck off to for the sum of that being the highest sum bid therefor.}]

And I further report, that I have executed and delivered to the purchaser a deed of the premises, that I have retained for my fees and disbursements, the sum of and have paid to the plaintiff's attorney the sum of for his costs in this cause, and have taken his receipt therefor, which is hereto annexed; and that I have paid to the plaintiff the sum of being the amount reported due him, with interest thereon, and have taken his receipt therefor, which is also hereto annexed. (And that the amount so bid and paid was insufficient to pay the amount reported due, with interest and costs, and that the deficiency is the sum of) (or that I have paid the surplus moneys into court, and have taken the receipt of the clerk thereof, which is also hereto annexed.) The premises are described as follows in such decree, notice and deed:|

All which is respectfully submitted.

Dated 187

A. B., Sheriff of county.

RECEIPTS ANNEXED TO REPORT.

(Title of action.)

Received 18 of sheriff of
county, the sum of in full of my costs in this action.

C. D., Attorney for Plaintiff.

(Title of action.)

Received 18 of sheriff of
county, the sum of being the amount reported due, with
interest C. D., Attorney for Plaintiff.

(Title of action.)

A. B., the sheriff of county, has this day
paid into court the sum of for surplus moneys in this action.

Dated 18

J. B., Clerk of county.

No: 218.

REPORT OF SALE IN PARTITION.

See § 559.

(Title of action.)

To the Supreme Court of the State of New York:

In pursuance of the decree of sale made in this cause on the
at by which it was, among other things, ordered and decreed,
that the premises described in said decree be sold by the sheriff of
county, according to the rules and practice of this court; and

that on making the said sale, said sheriff forthwith make report thereof to this court; I, the said sheriff, do certify and report, that in pursuance of said decree and of the statutes and the rules and practice of the said court, I gave due notice of the time and place of said sale, by causing a notice thereof to be published once in each week for six weeks successively, next preceding the day of sale therein mentioned, in a public newspaper printed in said county; which notice contained a brief description of the premises; and also by fastening up in three public places in the town where the said premises are situated and were advertised to be sold, six weeks next preceding the day of said sale, copies of the said printed notice; and that at the time and place mentioned in the said notice, I exposed the said premises for sale at public vendue, and the same were then and there struck off to for the sum of that being the highest sum bid therefor.

All which is respectfully submitted,

Dated 187

A. B., Sheriff of county.

No. 219.

SHERIFF'S DEED ON SALE UNDER DECREE IN PARTITION.

See § 559.

The same as No. 216 to the first asterisk, and then insert: "that after making said sale, said sheriff make report thereof to the said court, and after said judgment shall have been perfected, and the said report confirmed, that said sheriff execute and deliver to the purchaser or purchasers, a deed or deeds of the premises:" and after the second asterisk, add; "and the said sheriff having made report of his doings in the premises to the court, and the same having been duly confirmed by the order thereof." (Conclude as No. 216.)

No. 220.

FINAL REPORT OF SALE UNDER DECREE IN PARTITION.

See § 559.

(Title of action.)

To the Supreme Court of the State of New York:

In pursuance of the decree of sale in this cause, and of the order confirming the sale, made by this court on the day of
187 I, the sheriff of county, have executed to the purchaser a deed of the said premises so sold by me, upon receiving from said pur-

chaser the purchase money ; that I have retained the sum of
 out of said purchase money for my fees and disbursements ; and have
 paid to the attorney of the plaintiff for his costs and charges, the sum
 of and to the attorney for the defendant the sum
 of for his costs and charges ; and that I have divided the balance
 thereof amongst the several parties hereto, according to their respect-
 ive interests therein, and have paid to each their proportionate share
 thereof, to wit : to the sum of to the sum of
 and to the sum of under and pursuant to the decree in
 this cause, and that I have taken receipts for the said several sums so
 paid, as aforesaid, and have annexed the same to this my report.

All which is respectfully submitted.

Dated 187

A. B., Sheriff of county.

(Title of action.)

Received of sheriff of county, the sum
 of in full of my costs and charges in this action, as attorney
 for plaintiff. Dated 187

C. D., Attorney for Plaintiff.

(Title of action.)

Received of sheriff of county, the sum
 of in full of my share or portion of the moneys realized on the
 sale of the premises in this action.

Dated 187

E. F.

No. 221.

RETURN OF ARREST ON EXECUTION AGAINST THE BODY.

See § 566.

I have arrested the within defendant, and have him in my custody
 in the common jail of the county.

A. B., Sheriff of county.

No. 222.

RETURN OF ARREST WHERE THE DEFENDANT IS LET TO BAIL.

I have arrested the within defendant, and have let him to the
 liberties of the jail of said county.

A. B., Sheriff of county.

No. 223.

WHERE THE DEFENDANT RELEASED ON HABEAS CORPUS.

I return that I arrested the within defendant, and held and detained

him in my custody, under the within writ of execution, in the common jail of my county, until the day of when he was, in due form of law, removed from my custody by writ of habeas corpus, granted by Hon. C. H. D., and was then and there discharged from such arrest.

A. B., Sheriff of county.

No. 224.

RETURN WHERE ONE IS TAKEN AND THE OTHER CANNOT BE FOUND.

I have arrested the within defendant and have him in my custody in the common jail of the county; and the defendant cannot be found in my county after diligent search.

A. B., Sheriff of county.

No. 225.

RETURN WHERE THE DEFENDANT IS DISCHARGED FROM CUSTODY UNDER THE INSOLVENT LAWS.

See § 582.

I return, that I arrested the within defendant, and held him in my custody until the day of when said defendant was duly discharged from imprisonment by the county court of county, as an insolvent debtor.

A. B., Sheriff of county.

No. 226.

ARREST AND ESCAPE IN CONSEQUENCE OF A FIRE IN THE JAIL.

See § 612.

I arrested the within defendant, under the within writ of execution, and detained him in my custody in the common jail of the county until the day of when there casually occurred a fire in the said jail, whereby and by reason whereof, the said escaped therefrom, without my knowledge or assent; and that I could not prevent such escape, but the same was without default on my part; and that I have not been able, after diligent search, to retake the said defendant.

A. B., Sheriff of county.

No. 227.

AFFIDAVIT OF IMPRISONED DEBTOR ON A JUSTICE'S JUDGMENT TO OBTAIN HIS DISCHARGE.

See § 583.

(Title of action.)

County of ss. A. B., the defendant in this action, being duly

sworn, deposeth and saith, that he was committed to the jail of the said county on the day of under and by virtue of an execution issued by* a justice of the peace of said county, upon a judgment rendered before him in favor of the above named plaintiff, against this deponent, for the sum of damages and costs, on the day of 187 and that he, this deponent, has remained a prisoner on said execution from the time of such commitment, until the time of making this affidavit, to wit, the day of and this deponent further saith, that at the time of such commitment, he had and still has a family in the town of in said county and state of New York, for which he provides; and that at the time of such commitment he was not, nor has he been since, nor is he now, a freeholder; and further saith not.

Subscribed and sworn before me

this day of 187

A. B.

No. 228.

WHERE THE EXECUTION IS ISSUED BY THE COUNTY CLERK. .

See § 583.

Instead of the above description of the judgment and execution, insert after the asterisk: "the clerk of the said county, upon a judgment rendered before a justice of the of said county, in favor of the said plaintiff, and against this deponent, on the day of for damages and costs, and docketed in the office of the said clerk," (Conclude as last.)

No. 229.

WHERE THE PRISONER HAS NOT A FAMILY FOR WHICH HE PROVIDES.

See § 583.

The same as the foregoing in all respects, omitting the statement that he has such family.

No. 230.

BOND FOR THE LIBERTIES OF THE JAIL.

See §§ 332, 589.

(Penal part as No. 13.)

Whereas the above bounden is now in the custody of the above named sheriff of the county of by virtue of an order of arrest, made by the Hon. C. H. D., a justice of the supreme court of this

state, requiring the said to be held to bail in the sum of at the suit of (or, "by virtue an execution issued out of the supreme court of this state, at the suit of against the said for damages and costs, tested on the day of and returnable sixty days after the receipt thereof.")

Now, therefore, the condition of the said bond is such that if the above bounden so in custody of the above named sheriff, as afore. said, shall remain a true and faithful prisoner, and shall not at any time, or in any manner escape or go without the liberties established for the jail of the county of until discharged by due course of law, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the
presence of

A. B. (L. s.)

C. D. (L. s.)

E. F. (L. s.)

(Sureties to justify and all parties to acknowledge as Nos. 100, 101.)

No. 231.

ASSIGNMENT OF BOND.

See § 589.

Know all men by these presents, that I, sheriff of county, within named, do assign and set over to the plaintiff therein named at his request, the within bond or obligation, pursuant to the statute in such case made and provided. Dated 187

Signed, sealed and delivered
in the presence of

No. 232.

DEPUTATION OF BAIL TO ARREST PRINCIPAL.

See § 543.

Know all men by these presents, that I, A. B., (or we, A. B. and C. D.,) of, &c., being the same A. B. mentioned in the within copy of undertaking, (or bail bond, or bond for the limits, or recognizance,) have deputed, authorized and empowered in my place and stead and in my behalf, E. F., of, &c., to take, arrest, secure and surrender to the sheriff of the county of in the state of New York, G. H., in said copy of undertaking named in exoneration and discharge of my undertaking as bail of said G. H., in the cause therein mentioned,

and to employ such persons and assistants as may be necessary to effect said purpose. In witness whereof, I have set my hand hereto this day of 187

A. B. (L. s.)

No. 233.

CERTIFICATE OF SURRENDER OF DEFENDANT BY HIS BAIL.

See § 342.

(Title of cause.)

I certify that the surety in the undertaking given on the arrest of the defendant this day surrendered the said defendant in exoneration of them as bail, by delivering him into my custody, together with a certified copy of the undertaking given by the said surety.

Dated 187

A. B., Sheriff.

No. 234.

RETURN TO WRIT OF POSSESSION.

See §§ 571, &c.

I have caused the within plaintiff to have possession of the premises within described, with the appurtenances, as by the said writ I am within commanded.

No. 235.

WHERE THE PLAINTIFF NEGLECTS TO POINT OUT THE PREMISES

I certify and return, that I have been at all times ready to execute the within writ, from the day of its receipt by me, to the last day of its return, to wit, &c., but that no one, on behalf of the within plaintiff came to show me the premises within described; wherefore I could not make the said to have possession of the said premises as by the said writ is required.

Dated 187

A. B., Sheriff.

No. 236.

RETURN OF SERVICE OF HABEAS CORPUS.

See § 625.

(Title of matter or proceeding.)

County of ss. I certify that on the day of at I

served the writ of habeas corpus issued by in the above entitled matter, a copy of which is hereto annexed, upon the said by delivering the same to him personally, at in said county.
A. B., Sheriff of county.

[No. 237.]

RETURN WHERE THE PARTY CANNOT BE FOUND.

See § 625.

(Title of matter or proceeding.)

County of ss. I certify that on the at in said county, I served the writ of habeas corpus issued by in the above entitled matter, a copy of which is hereto annexed, upon the said by leaving at the residence of the said the said writ with the wife of the said who then had the above named infant in charge, in the absence of the said who could not be found.

A. B., Sheriff of county.

No. 238.

WHERE THE PARTY CONCEALS HIMSELF.

See § 625.

(Title of matter or proceeding.)

County of ss. I certify that on the day of at in said county, I served the writ of habeas corpus issued by in the above entitled matter, a copy of which is hereto annexed, upon the said by affixing the said writ, in a conspicuous place, on the outside of the front door of the dwelling house of the said the said concealing himself within (or refusing admittance to me to make personal service.)

A. B., Sheriff of county.

No. 239.

WHEN THE PARTY SERVED IS A SHERIFF, CORONER, CONSTABLE
OR MARSHAL.

See § 624.

Add, after describing the manner of service: "and also at the same time paying (or tendering) to said the sum of for his fees in bringing up the said prisoner; and delivering (or tendering) to said a bond in the penal sum of conditioned to pay to said the

charges for carrying back said prisoner if he should be remanded, and that such prisoner will not escape by the way, either in going to or returning from the place to which he is to be taken.

No. 240.

RETURN TO HABEAS CORPUS.

See § 625.

I do hereby return to the justices of the supreme court (or to the Hon. a justice of the supreme court, or county judge of county) that before the coming to me of the within writ, the said was committed to my custody, and is detained by virtue of another writ, a copy of which is hereto annexed; the original of which I also herewith produce; nevertheless I have the body of the said before you at the day and place within mentioned, as I am within commanded

A. B., Sheriff of county.

No. 241.

RETURN WHERE THE PRISONER IS SICK.

See § 629.

I do hereby return to the justices of the supreme court (or, to the Hon., &c.) that before the coming to me of the within writ, the said was committed to my custody, and is detained by virtue of another writ, a copy of which is hereto annexed; the original of which I also herewith produce; and that the said now lies in the jail of said county, sick and infirm and so remains, so that he cannot, without danger, be brought before the court now here, as I am within commanded; therefore I cannot have his body at as I am within commanded.

A. B., Sheriff.

County of ss. the sheriff of said county, who makes the above return, being duly sworn, says, that the said return is in all respects true, according to his information and belief.

Sworn before me this

day of 187

A. B.

No. 242.

WHERE THE PARTY IS NOT IN THE SHERIFF'S CUSTODY.

See §§ 628,

I hereby return to the justices of the supreme court (or, to the

Hon., &c.) that before the coming to me of the within writ, the said was committed to my custody, and was detained by virtue of another writ, a copy of which is hereto annexed; the original of which I also herewith produce; but that said is not now, and was not at the delivery of the within writ to me, in my custody or under my power or restraint, the said having on the night of the broke the jail and escaped therefrom, and has not been retaken; (or, the term of his sentence having expired, I did on discharge said from confinement in said jail; or, that on the the said was in due form of law let to bail by county judge; or, that by virtue of a bench warrant issued by the district attorney of county, I did on the day of deliver the said into the custody of the sheriff of county;) wherefore I cannot have the body of the said at the day and place within named, as I am within commanded.

A. B., Sheriff.

No. 243.

PROOF OF SERVICE OF A WRIT OF CERTIORARI.

See §§ 637.

(Title of matter or proceeding.)

County of ss. I certify that on the day of I served the writ of certiorari issued by the Hon. in the above matter or proceeding, upon the person named therein, by delivering such writ to him, personally, in in said county.

A. B., Sheriff of county.

No. 244.

RETURN TO CERTIORARI.

See § 637.

County of ss. I certify and return to the supreme court of the state of New York (or, to Hon. C. H. D., justice of the supreme court, &c.) as I am within commanded, that before the coming to me of the within writ of certiorari, to wit, on the day of the within named was committed to my custody, as sheriff of the county of by virtue of an execution issued upon a judgment, &c., (or, by virtue of a warrant of commitment of justice of the peace of county), a true copy of which is hereto annexed, and that he is detained by me for no other cause. Dated

A. B. Sheriff of county.

No. 245.

HABEAS CORPUS AD TESTIFICANDUM.

See § 201.

The people of the state of New York, to the sheriff of the county of
greeting :

[L. s.] We command you that you have the body of de-
fendant in your prison under your custody, under safe and
secure conduct, before* our circuit court, to be held at the court house
in the town of on the to testify and give evidence in
a certain action now pending in the said supreme court, then and
there to be tried between plaintiff and defendant, on the
part of the plaintiff (or defendant,) and that immediately after the
said shall have given his testimony in said action, that you
return him to your prison under safe and secure conduct; and have
you then there this writ.

Witness, C. H. D., justice of the supreme court, at the court house
in, &c., the day of 18 J. B., Clerk.

A. B. Attorney.

(Endorsed.) Allowed this day of 18

C. H. D., Justice of the Supreme Court.

No. 246.

THE SAME TO BRING A WITNESS BEFORE A REFEREE OR JUSTICE.

See § 201.

The same as the last to the asterisk, and add: "A. B., referee in a
cause pending before him as such referee, (or before C. D., a justice
of the peace, in a cause pending before him,) wherein is plain-
tiff and is defendant, on the part of the plaintiff (or defend-
ant,)" and then the same as the last.

No. 247.

BOND TO BE GIVEN ON ISSUING HABEAS CORPUS.

See § 624.

(The penal part as No. 13; and the penalty to be in double the
amount of the sum for which the prisoner may be detained, if he be
detained for any specific sum of money, and if not, then in the penalty
of \$1,000.) The condition of the bond is as follows :

Whereas a writ of habeas corpus (ad testificandum) has been issued by the Hon. C. H. D., a justice of the supreme court ; (or, by the supreme court, or county court of now in session at, &c.) by which the said sheriff is commanded that he bring now in the custody of him the said sheriff under and by virtue of before the said justice of the supreme court, (or before the said court, or before A. B., a referee, or C. D., a justice of the peace) on the application of the said

Now therefore, the condition of the above obligation is such, that if the said shall pay to said sheriff all charges for carrying back such prisoner, if he shall be remanded, (or after he has testified) ; and that such prisoner shall not escape by the way, either in going to or returning from the place to which he is to be taken, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered

A. B. (L. s.)

in the presence of

C. D. (L. s.)

No. 248.

JUSTIFICATION OF SURETY TO BOND.

County of C. D., the surety in the foregoing bond, being by me duly sworn, deposeth and saith that he is a resident of said county and a householder (or freeholder) therein, and that he is worth, over and above all debts and liabilities, in addition to the property exempt from levy and sale on execution, the sum of dollars ; and further saith not. C. D.

Subscribed and sworn before me
this day of 18

(To be acknowledged as No. 14.)

No. 249.

OATH OF JURORS ON WRIT OF INQUIRY.

See § 653.

You and each of you, do swear that you will well and truly hear and determine the matter in difference between plaintiff and defendant, and true inquisition make, according to the evidence ; so help you God.

No. 250.

OATH TO WITNESS.

See § 655.

You do swear that the evidence you shall give in the matter in

difference between plaintiff and defendant, shall
be the truth, the whole truth and nothing but the truth; so help
you God.

No. 251.

INQUISITION.

See § 655.

County of ss. Inquisition taken this day of before
me, A. B., sheriff of county, at by virtue of a writ of
inquiry to me directed and to this inquisition annexed, to inquire of
and concerning certain matters in said writ contained and specified,
by the oaths of twelve good and lawful men of said county,
who being summoned and sworn, say upon their oaths, that the
plaintiff in the said writ named hath sustained damages by reason
of the premises in the writ mentioned, over and above his costs and
charges, to dollars.

In witness whereof, we, as well the said sheriff, as the said jurors,
have set our hands and seals to this inquisition, the day and year
above written.

A. B., Sheriff. (L. s.)

Jurors.

Jurors.

(L. s.)

(L. s.)

(L. s.)

(L. s.)

No. 252.

NOTICE OF EXECUTION OF A WRIT OF AD QUOD DAMNUM.

See § 657.

STATE OF NEW YORK, }
County of } ss.

By virtue of a writ of ad quod damnum, issuing out of the supreme
court of this state, and tested on the day of and to me
directed and delivered, by which I am commanded, by the oaths of
twelve good and lawful men of my county, to inquire if the persons,
or any of them owning the premises hereinafter described, will sus-
tain any and what injury by reason of the taking of such premises
for the use of the people of this state, (or of the United States.)

The said premises are described as follows:

Notice is therefore hereby given, that I will proceed to execute the
said writ on the day of at in said county.

Dated 187

A. B. Sheriff of county.

No. 253.

OATH TO JURORS ON WRIT OF AD QUOD DAMNUM.

See § 657.

You do swear, that you will diligently inquire whether the person (or persons) owning the lands or tenements to be viewed by you, and which are mentioned and described in the writ of ad quod damnum, issued by the supreme court of this state, to the sheriff of county, will sustain any and what injury by reason of the taking of such premises, for the use of the people of this state (or of the United States) and will give a true verdict, according to the best of your judgment, without favor or partiality ; so help you God.

No. 254.

INQUISITION UPON A WRIT OF AD QUOD DAMNUM.

See § 657.

STATE OF NEW YORK, }
County of } ss.

Inquisition taken this day of 18 at, &c., before sheriff of county, under and by virtue of the writ of ad quod damnum, to said sheriff directed and delivered and to this inquisition annexed, by the oaths of qualified jurors of said county, who being duly summoned and sworn by the said sheriff, say, upon their oaths, that A. B. is the owner in fee of the lands and tenements firstly described in said writ, as follows :

C. D. is the owner in fee of the premises secondly described in said writ, as follows :

And E. F. holds the said last mentioned premises by lease granted by on, &c., for the term of years, at an annual rent of dollars ;

That said A. B. will sustain injury and damages, to the amount of dollars, by being deprived of the said premises so owned by him ;

That said C. D. will sustain damages to the amount of dollars, by being deprived of the said premises so owned by him ;

And that E. F. will sustain injury and damages to the amount of dollars, by being deprived of the said premises so held by him, as aforesaid.

And the said jurors, upon their oaths aforesaid, do further say that the people of the state of New York should pay for the said several parcels of lands and tenements, the said several sums so assessed as

aforesaid, to the said persons, to whom the same are assessed as afore said, respectively.

In witness whereof we, the said sheriff, as well as the said jurors, have hereto set our hands and seals, the day and year first above written.

A. B., Sheriff, (L. s.)

Jurors.
(L. s.)

No. 255.

RETURN OF EXECUTION OF WRIT OF AD QUOD DAMNUM.

County of ss. I certify and return, that on the coming to me of the within writ of ad quod damnum, I caused due notice of the time and place of executing the same to be given, by publishing a notice thereof once in each week for three weeks successively, immediately preceding such time, in a public newspaper printed in said county; that I summoned twelve qualified jurors of my county, as I am within commanded, to attend at the time and place designated in such notice for executing said writ, and then and there administered to each of said jurors, the oath prescribed by statute; that thereupon the said jurors viewed together all the lands and tenements specified in said writ, and after so viewing the same, made inquisition of the matters required in and by the within writ by them to be made; which inquisition, under the hands and seals of the said jurors, as well as under my hand and seal, is hereto annexed.

Dated 187

A. B., Sheriff of county.

No. 256.

CERTIFICATE OF SERVICE OF A JUDGE'S ORDER UNDER PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

See § 664.

County of ss. I certify that on the day of 187 I served the within order upon the within named defendant in in said county, by delivering to him personally a copy thereof, and at the same time showing him the within original order.

A. B., Sheriff.

No. 257.

RETURN TO PRECEPT FOR SUMMONING A JURY IN A CASE OF LUNACY.

The execution of the within precept will appear by the panel of jurors hereto annexed.

A. B., Sheriff.

No. 258.

PANEL OF JURORS TO BE ANNEXED TO PRECEPT.

Panel of jurors summoned by me, under and pursuant to the annexed precept.

A. B., Sheriff,

A. K., farmer, of D.

C. D., mechanic, of E., &c.

No. 259.

AFFIDAVIT OF SUMMONING JURY IN PLANK ROAD CASE.

See § 679.

County of ss. A. B., the sheriff of county, to whom the within precept was delivered for service, deposeth and saith, that the following jurors therein named, to wit: were each duly personally served by him to appear as such jurors at the time and place, and for the purposes in the said precept named, at least four days before the day therein specified for hearing; and that the following jurors, to wit: were in like manner duly served by him, by leaving at their respective places of residence, a written notice containing the substance of the within precept; and that the distance actually and necessarily traveled by me in making the said service, was miles.

Subscribed and sworn before me

this day of

A. B.

No. 260.

RETURN TO PRECEPT FOR SUMMONING A JURY IN A CASE OF FORCIBLE ENTRY.

See § 684.

(The same as Nos. 257, 258.)

No. 261.

CERTIFICATE OF SERVICE OF NOTICE OF ISSUING THE PRECEPT.

See § 682.

I certify that on the day of I served a notice of which the within is a copy, upon by delivering the same to (him personally;) (or, if he cannot be found, "by delivering the same to his wife, upon the premises therein mentioned, the said not being found;")

or, if there is no person on the premises on whom the same can be served, "by affixing the same on the outer door of the house, the said not being found, and there being no person on the within premises upon whom such service could be made;") (or, if there be none, "by affixing the same upon the fence on said premises, on the public highway, being the most public and suitable place on the premises, the said not being found, and there being no person on the premises on whom service could be made, and there being no house thereon.")

A. B., Sheriff.

No. 262.

CERTIFICATE OF SERVICE OF A SUMMONS IN SUMMARY PROCEEDINGS TO OBTAIN POSSESSION OF LANDS.

See § 690.

I certify that on the day of I served the within summons upon the within by delivering to him a true copy thereof, and at the same time showing him the original summons.

A. B., Sheriff.

No. 263.

WHERE THE TENANT IS ABSENT.

I certify that on the day of 187 I served the within summons by delivering and leaving a copy thereof with the wife of said at his last place of residence, he being absent therefrom, and such residence being in the same town with the demised premises.

A. B., Sheriff.

No. 264.

WHERE NO PERSON FOUND AT TENANT'S RESIDENCE.

I certify that on the day of 187 I served the within summons by delivering and leaving a copy thereof with C. D., a person of mature age residing on the demised premises, the said being absent from his place of residence, and no person of mature age being found thereat on whom to make service.

A. B., Sheriff.

No. 265.

WHERE THE PREMISES ARE NOT IN SAME TOWN WITH TENANT.

I certify that on the day of 187 I served the within sum

mons by delivering to and leaving with C. D., a person of mature age residing on the demised premises, the tenant being absent from his place of residence and the demised premises not being in the same town (or city.)
A. B., Sheriff.

No. 266.

WHERE NO PERSON RESIDES ON THE PREMISES.

I certify that on the day of 187 I served the within summons by delivering to and leaving a copy thereof with C. D., a person of mature age, a clerk in the store on the demised premises, the tenant being absent from his place of residence, and said premises not being in the same town with the said residence and no person residing on the premises.

A. B., Sheriff.

No. 267.

WHERE NO PERSON FOUND ON THE PREMISES.

I certify that on the day of 187 I served the within summons by affixing a copy thereof on the front door or conspicuous part of the demised premises, the tenant having no place of residence in the county and no person residing on the premises or employed in any business upon the premises.

A. B., Sheriff.

No. 268.

RETURN TO A PRECEPT FOR A JURY IN SUCH CASE.

See § 691.

I have summoned the several jurors named in the within precept, to appear at the time and place within mentioned; the said were summoned personally, and the said who could not be found, were summoned by leaving at their respective residences, with persons thereat of proper age, a notice that they had been nominated as such jurors, and the time and place at which they were required to attend.

A. B., Sheriff.

No. 269.

RETURN OF SERVICE OF ORDER UPON A DEFAULTING JUROR TO SHOW CAUSE.

See § 696.

I certify that on the day of I served the within order upon

the within named by delivering to him personally a copy thereof, and at the same time showing him the within original order.

A. B., Sheriff.

No. 270.

RETURN TO PROCESS OF DISTRICT ATTORNEY FOR COLLECTION OF FINES.

See § 700.

I have made the sum of directed to be collected of the within named besides my fees, and have paid the same to the county treasurer. The within having no goods or chattels in my county, whereof I could make the amount of the within fine imposed upon him, I have committed him to the jail of the county, where he now remains. I cannot find any goods or chattels of the said in my county, whereof I can make the amount of the fine imposed upon him, or any part thereof, nor can I find the said in my county.

A. B., Sheriff.

No. 271.

RETURN TO WARRANT OF COUNTY TREASURER AGAINST A DELINQUENT COLLECTOR.

See §§ 704, 765

I have made the sum of upon the within warrant, exclusive of my fees; and the within collector has no goods or chattels, lands or tenements within my county, whereof I can make the remainder of the moneys mentioned in the within warrant.

Dated 18

A. B., Sheriff.

No. 272.

RETURN TO WARRANT FOR COLLECTION OF UNPAID TAXES.

See §§ 707, &c.

I have collected the amount directed to be collected of the within named C. D., E. F. and G. H., and I can find no property whereof to make the amount directed to be collected of the within J. K.

Dated

A. B., Sheriff.

No. 273.

CERTIFICATE OF SERVICE OF NOTIFICATION OF THE COMPTROLLER.

See § 716.

County of ss. I certify that on the day of 187 I

served the within notification upon the within named by delivering to him personally a copy thereof.

A. B., Sheriff.

No. 274.

THE SAME WHERE THE PARTY IS ABSENT.

See § 716.

County of ss. I certify that on the day of 187 I served the within notification upon the within named by leaving a copy thereof with his wife, at his usual place of abode, he being absent therefrom.

A. B., Sheriff.

No. 275.

RETURN TO WARRANT OF COMPTROLLER AGAINST DEFAULTING CANAL COLLECTOR.

See § 717.

I have made the amount of the within warrant of the goods and chattels of C. D. and E. F., the surety of the within G. H., he having no goods or chattels, lands or tenements whereof I could make the amount of any part thereof.

A. B., Sheriff.

No. 276.

NOTICE OF SALE OF DISTRESS.

See §§ 722, &c.

Sheriff's Sale.

By virtue of a distress, I shall expose for sale, as the law directs, at in, &c., the following described property, to wit:

A. B., Sheriff.

No. 277.

INVENTORY AND APPRAISAL OF DISTRESSED PROPERTY.

See §§ 722, &c.

Inventory and appraisal of goods and chattels seized by the sheriff of county, under and by virtue of, in, &c., made by the undersigned, three disinterested freeholders of the said town of upon oath, to wit:

One bay horse, value, &c., &c.

\$50

Dated

A. B. }
C. D. } Appraisers.
E. F. }

We certify that the foregoing is a just appraisal of the property within described, appraised by us at the instance of sheriff of county, this day of 187

A. B. }
C. D. } Appraisers.
E. F. }

No. 278.

PROOF OF POSTING NOTICE OF SALE.

See § 722, &c.

County of ss. A. B., being duly sworn, deposeeth and saith, that on the day of 187 he posted in three public places in the town of in said county, a notice of sale, of which the foregoing (or annexed) notice is a true copy.

Subscribed and sworn before me

this day of 187

A. B.

No. 279.

AFFIDAVIT OF OFFICER MAKING THE DISTRESS.

See § 733.

County of ss. A. B., being sworn, saith, that he is the sheriff of said county; that the property mentioned in the annexed inventory and affidavit was distrained by this deponent under and by virtue of that the amount of the penalty was that the property sold for the sum of that I have paid the said penalty out of the proceeds; that I have retained the expenses of the appraisal, certificate, notice, proof and affidavits, and of the filing of the same, amounting to and that the surplus, being the sum of I have this day paid to the county treasurer.

Subscribed and sworn before me

this day of

No. 280.

APPRAISAL OF WRECKED PROPERTY.

See § 736.

STATE OF NEW YORK, }
County of } ss.

We, the undersigned, at the instance of the sheriff of county,

do appraise the wrecked property hereafter mentioned, as follows, to wit :

One sloop named lying at in said county, at \$

Her anchor,

Sails,

Load of damaged wheat,

\$

Dated 187

A. B., }
C. D., } Appraisers.

A. B., Sheriff.

No. 281.

NOTICE OF WRECKED PROPERTY.

See § 738.

To all whom it may concern :

Notice is hereby given, that the undersigned has this day taken into his possession at in said county, a sloop named of one iron anchor and two sails. Said sloop is loaded with wheat now in a damaged condition ; that said vessel and other property are now at the said and that the wheat is in a damaged condition, being wet and beginning to heat, &c.

Dated 187

A. B., Sheriff of county.

No. 282.

PETITION FOR SALE OF DAMAGED PROPERTY.

See § 724.

To the Hon. County Judge of county :

The undersigned, sheriff of said county, has this day taken possession of a sloop, named iron anchor, two sails, and wheat in the hold, in a damaged condition ; that he has caused the same to be appraised by two disinterested persons, a copy of which appraisal is hereto annexed, and that he has given the notice of such wrecked property, required by law in such cases ; that said wheat is in a damaged state, and unless it is worked up soon will spoil ; he therefore prays that the same may be sold as in such case is provided.

A. B., sheriff of said county.

County of ss. A. B., sheriff of said county, being sworn

says, that the foregoing petition is true to the best of his knowledge and belief.

Subscribed and sworn before me

this day of 187

C. D., County Judge of county.

No. 283.

NOTICE OF ELECTION TO BE PUBLISHED AND SERVED.

See § 763.

Election Notice.

SHERIFF'S OFFICE, }
County of }

Notice is hereby given, pursuant to the statutes of this state, and of the annexed notice from the secretary of state (or, order of the board of county canvassers, or proclamation of the governor) that the general election in this state (or, a special election for said county) will be held in this county on the Tuesday succeeding the first Monday of November next; at which election, the officers named in the annexed notice) or order, or proclamation) will be elected.

A. B., Sheriff.

(Annex copy notice, order or proclamation.)

No. 284.

PROOF OF SERVICE OF A CITATION TO ATTEND THE PROBATE OF A WILL.

See §§ 39, 774.

County of ss. C. D. being sworn, says, that on the day of 18 he served the within citation upon the within named by (delivering to him a copy thereof, and at the same time showing him the within original citation, at in said county; (or, if he cannot be found, say, "by leaving a copy thereof on the day of 18 at the place of residence of the said in the town of with the mother of said with the request to deliver the same to said as soon as might be; and that this deponent has since learned that said did on or about return to his said residence, where the said copy was left for him, as aforesaid."

Subscribed and sworn before me

this day of

C. D.

A. B., Surrogate.

No. 285.PROOF OF SERVICE OF CITATION ON EXECUTOR OR ADMINISTRATOR TO
ANSWER CHARGES.

See § 774.

County of ss. I certify that on the day of 18
I served the within citation on the within named by delivering
to him personally a copy thereof, and at the same time showing him
the within original citation (or if he shall have absconded, say, "by
leaving a copy thereof at his place of residence, with his wife,
he having absconded from the county.") A. B., Sheriff.

No. 286.PROOF OF SERVICE OF A CITATION UPON A GUARDIAN TO ANSWER
CHARGES.

See § 772.

If he can be found, the proof of service is the same as the last.

If he has absconded or concealed himself so that he cannot be personally served, say, "by leaving a copy thereof with at his last place of residence, he having absconded from the county (or concealed himself) so that personal service could not be made upon him."

No. 287.

NOTICE TO SHERIFF TO RETURN PROCESS.

See § 799.

(Title of action.)

To Sheriff of county :

Sir : You are hereby notified to return the summons and complaint (judge's order, &c., or execution,) delivered to you for service in this cause, within ten days after the service of this notice, or show cause at a special term of this court to be held at the court house in the on the day of at the opening of the court, why an attachment should not issue against you for neglect thereof, with costs of such motion. Dated

Yours, &c.,

A. B., Attorney for Plaintiff.

No. 288.

PROOF OF SERVICE OF NOTICE TO RETURN PROCESS.

(Title of action.)

County of ss. A. B., being sworn, deposeth and saith, that

on the day of 18 he served a notice, of which the annexed is a copy, on the within named sheriff of county, by delivering the same to him personally (or if he cannot be found, "by leaving the same in his office during the hours the same is by law required to be kept open, no person being present therein.")

Or, I admit service of a notice of which the within is a copy, this
day of 18

C. D., Sheriff.

No. 289.

AFFIDAVIT OF DELIVERY OF EXECUTION TO THE SHERIFF.

(Title of action.)

County of ss. A. B., being sworn, says, that he is the attorney for the plaintiff in this action; that judgment was perfected and the roll thereof filed in the clerk's office of county, on the day of 18 for dollars and cents, damages and costs, and a transcript thereof was filed and the judgment docketed in the clerk's office of county, on the day of as this deponent is informed and believes; that execution in due form of law was duly issued thereon to the sheriff of said last mentioned county, by which said sheriff was commanded to make the said sum of with interest and his fees, and to return such execution to the office of the clerk of county, within sixty days after the receipt thereof by him, the said sheriff; and that the same was received by said sheriff for execution on the day of as this deponent is informed and believes. That this deponent has made inquiries at the office of the clerk of county for said execution, and that he has learned that although the time for returning said execution has expired, said execution has not been returned; and that the said judgment, nor any part thereof, has not been paid to the plaintiff; but that the whole remains due and unpaid; and that the said sheriff is in default in not returning the said execution, and in not paying over the said moneys.

Sworn before me this

day of 187

No. 290.

PROOF OF SERVICE OF NOTICE TO RETURN AN EXECUTION AND OF SERVICE OF AFFIDAVIT OF DELIVERY THEREOF, ON THE SHERIFF.

(Title of action.)

County of ss. A. B., being sworn, says, that on the

day of he served the foregoing notice and affidavit on the above named sheriff of county, by delivering copies thereof to him personally (or if he cannot be found, "by leaving copies thereof with C. D., a clerk in the office of said sheriff, during the hours in which said office is required by law to be kept open, the said being then absent therefrom."

No. 291.

PROOF THAT THE EXECUTION HAS NOT BEEN RETURNED.

(Title of action.)

County of ss. A. B. being sworn, says, that on the day of 18 he made diligent search of the files of the office of the clerk of the county of in the place where executions are kept therein, and that the execution in this action, directed and delivered to the sheriff of county, on the day of cannot be found on said files on such search; and this deponent verily believes that such execution has not been returned to said office.

Subscribed and sworn before me

this day of 18

A. B.

No. 292.

THE SAME IN ANOTHER FORM.

(Title of action.)

County of ss. A. B. being duly sworn, deposeth and saith, that on the day of he, this deponent made inquiry at the office of the clerk of county, for the execution issued in said action to the sheriff of county, on the day of 18 and returnable to said office; and that this deponent was informed by said clerk (or by a clerk therein) after search, that such execution had not been returned to said office; and this deponent verily believes that such execution has not been returned to said office.

Subscribed, &c.

No. 293.

ORDER FOR AN ATTACHMENT.

At a special term of the supreme court, held for the state of New York, at the in the on the day of 187 .
Present,

Hon. Justice.

(Title of action.)

On reading and filing the affidavit of showing

the delivery of an execution in this cause to the sheriff of county, notice to return the same, and of this motion, and due process of service of the same on such sheriff, together with an affidavit showing that such execution had not been returned, according to the command thereof; and on motion of Mr. of counsel for the plaintiff, no one appearing to oppose, it is ordered that an attachment issue against the said sheriff of county, returnable before this court on the day of at the in the at the opening of the court; also, that said sheriff pay to said plaintiff's attorney ten dollars, costs of this motion.

If the attachment is against the present sheriff, it should be directed to the coroners of the county; or to one of them by name. If the attachment is against the late sheriff, it is to be directed to the present sheriff, and not to the coroner. If the attachment is against the coroner for not returning the attachment, it is directed to elisors, to be appointed by the court. If against either the sheriff or coroner, for not returning the first attachment, the indorsement and allowance is as follows:

(Title of action.)

Issued against the said for not returning a certain attachment directed and delivered to him against for contempt; and the said is not to be discharged on bail or in any other manner, but by order of the court.

Dated 18

C. H. D., Justice of Supreme Court.

No. 294.

ATTACHMENT FOR NOT RETURNING AN EXECUTION.

See § 805.

The People of the State of New York, to the coroners of the county of :

(L. s.) We command you that you attach sheriff of our county of so that you have him before our justices of our supreme court of judicature, at the on the &c., to answer for certain trespasses and contempts done and committed in our court before our justices thereof; and have you then there this writ.

Witness Hon. one of the justices of the supreme court, the day of at, &c. J. B., Clerk.

A. B. Attorney.

(Endorsed on the writ.)

Supreme Court.

The People of the State of New York, ex. rel. C. D.

against

C. D., Sheriff of county.

A. B., Attorney.

Attachment returnable the day of at, &c.

Issued by special order of the court, for not returning an execution in favor of E. F. against G. H., for dollars and costs, issued and directed and delivered to the said as the sheriff of county.

Let the said be held to bail in the sum of dollars.

C. H. D., Justice of the Supreme Court.

No. 295.

BOND TAKEN ON ARREST ON ATTACHMENT.

See § 806.

(Penal part as No. 13. The penalty, the amount mentioned in the order or allowance indorsed on the writ.)

The condition of the above obligation is such, that if the above bounden (late) sheriff of the county of shall appear before the justices of the supreme court of this state, at a special term thereof to be held at the court house in in the county of on the day of and abide the order and judgment of the court on the attachment issued against the said for not returning an execution in favor of against then this obligation to be void, otherwise to remain in full force.

Sealed and delivered

in the presence of

(L. S.)

(L. S.)

(L. S.)

(To be signed and affidavit of justification and certificate of acknowledgment as Nos. 100, 101.)

No. 296.

RETURN TO THE ATTACHMENT.

I have arrested the within defendant, and have taken from him a bond in the penalty marked on the writ, with as his surety, and return the same herewith. Dated 187

A. B., Sheriff.
(or Coroner.)

No. 297.

INTERROGATORIES TO THE SHERIFF.

(Title of action.)

Interrogatories to be administered to the sheriff of the county of _____ touching a complaint against him in not returning a certain execution against property, issued out of the said court in favor of plaintiff and against _____ defendant, (or a certain summons and complaint, judge's order, &c.)

First interrogatory: Did you or not, in person or by deputy, or otherwise, at any and at what time, receive for service a certain execution to you directed as sheriff of the county of _____ wherein _____ was plaintiff, and _____ defendant, tested on the _____ day of _____ and returnable within sixty days from its receipt by you?

Second interrogatory: Did you at any and what time, receive any and what notice to return such execution? and state the purport of that notice.

Third interrogatory: Did you execute or serve the said writ: If yea, when and where, particularly?

Fourth interrogatory: Have you or have you not returned that execution, and if yea, when and where, in particular; and if nay, why have you not returned the same?

A. B., Attorney for Plaintiff.

No. 298.

ANSWER OF THE SHERIFF TO INTERROGATORIES.

(Title of action.)?

The answer of _____ sheriff of _____ to the interrogatories hereto annexed, filed in this action, upon the return of the attachment herein:

To the first interrogatory, he answereth and saith, that he received, by his deputy, as he is informed and believes, the execution mentioned in the first interrogatory hereto annexed, on or about the, &c.

To the second interrogatory, he answereth and saith, that on or about the _____ day of _____ he was served with a notice to return the said execution, within ten days thereafter, or show cause why an attachment should not issue against him; and pay the costs of the motion.

To the third interrogatory, he answereth that he has not.

To the fourth interrogatory, he says that the said execution was delivered to one C. D., a deputy of this deponent, as he is informed

and believes, and not to this deponent; that he never had information of said execution until on or about the day of ; that said deputy, at the time he received said execution, was instructed and directed by A. B., the attorney for the plaintiff in this action, as this deponent is informed and believes true, of the time and place and manner of executing said writ; that said deputy was authorized and instructed to depart from the regular course of proceeding upon the execution of such process, and that he did so depart from the regular course of proceeding on such execution, and thereby this deponent became and was released from all responsibility of and concerning the execution of the said process; and the said deputy thereby became and was the agent of said plaintiff in the execution of such process; that before this deponent was notified to return said execution, said deputy had absconded and had carried off said execution, and that the same cannot be found, so that return thereto may be made by this deponent, if it be proper that this deponent should, under the circumstances, make return to such process.

Subscribed and sworn before me

this day of

A. C.

No. 299.

CERTIFICATE THAT DEFENDANT IS IMPRISONED.

(Title of action.)

I do certify that the above named defendant is a prisoner confined within the jail of the county of in execution, at the suit of the above named plaintiff, by virtue of an execution against the body, issuing out of this court, (or if out of any other court, specify such court,) and lodged in my office against him, whereby I am directed to levy and receive the sum of dollars and cents, with interest and my fees.

Dated, &c.

A. B., Sheriff of county.

No. 300.

CERTIFICATE THAT DEFENDANT IS IN CUSTODY, AND THAT NO EXECUTION HAD BEEN DELIVERED.

(Title of action.)

I certify that the above defendant is in my custody in the jail of my county, on surrender made by his bail in this action,

delivered to him certified copies of the affidavits in this matter, and have the same defendant now here as I am within commanded.

Dated 187

A. B., Sheriff.

No. 304.

AFFIDAVIT OF SUMMONING JURORS IN PLANK ROAD CASE.

See § 679.

County of ss. A. B., sheriff of the above named county, being duly sworn, says that he summoned the jurors named in the annexed precept at the times and in the manner set opposite to their names respectively, to wit:

C. D., personally, Jan. 2, 187

E. D., personally, Jan. 2, 187

F. E., by leaving at his residence a written notice containing the substance of the precept with a member of his family of suitable age, Jan. 3, 187, he not being found.

G. H., personally, Jan. 3, 187, &c., &c.

Subscribed and sworn before me
this day of 187

No. 305.

ANNUAL REPORT OF MONEYS RECEIVED BY SHERIFF.

See § 702.

To the board of supervisors of the county of
The undersigned, the sheriff of the said county, under and pursuant to the provisions of chapter 404 of the laws of 1863, respectfully reports that the following statement contains a true account of all the moneys received by him on account of any fine or penalty or other matter in which the county has an interest; and which states particularly the time when and the names of the persons from whom such moneys have been received, and on what account the same has been received, from and including the first day of November 187 to date; all which moneys were duly paid over without any deduction for costs or charges in collecting the same to the county treasurer, as will appear by the receipts hereto annexed.

187, Jan. 6, Received of C. D., on account of a fine for \$10.

" Jan. 10, Paid to county treasurer

Dated Nov. 1, 187.

A. B., Sheriff.

County, ss. A. B. being duly sworn deposes and says that the foregoing report by him subscribed contains according to his best information and belief a full and correct statement of all the moneys received by him on account of any fine or penalty or other matter in which the county is interested from and including the first day of November to date, and how the same has been disposed of.

Subscribed and sworn this 1st day of A. B.
November, 187 before me.

No. 306.

OATH TO ACCOUNTS RENDERED BY SHERIFFS, CORONERS, OR CONSTABLES
TO BOARD OF SUPERVISORS.

See § 1155.

County of ss. A. B., being duly sworn, says, that the items of the annexed account are correct, and that the disbursements and services charged therein, have been in fact made and rendered, and that no part thereof has been paid or satisfied.

Subscribed and sworn before me A. B.
this day of 18

PROCLAMATIONS BY CRIER.

No. 307.

PROCLAMATION ON OPENING THE COURT.

See §§ 151, 1163.

Hear ye, hear ye, hear ye. All manner of persons that have any business to do at this court, let them draw near and give their attendance and they shall be heard.

No. 308.

FOR THE SHERIFF TO RETURN PROCESS.

Hear ye, hear ye, hear ye. Sheriff of the county of
Return the writs and precepts to you directed and delivered and returnable here this day, that the court may proceed thereon.

No. 309.

BEFORE CALLING THE GRAND JURY.

Hear ye, hear ye, hear ye. You who are here returned to inquire for the people of the state of New York for the body of the county of answer to your names at the first call and save your fines.

No. 310.

FOR BAIL TO PRODUCE THEIR PRINCIPAL.

Hear ye, hear ye, hear ye. C. D. and E. F. Bring forth A. B., your principal, whom you have undertaken to have here to-day, or you will forfeit your recognizance.

No. 311.

FOR THE DISCHARGE OF A PRISONER AGAINST WHOM NO BILL IS FOUND.

Hear ye, hear ye, hear ye. If any man can show cause why A. B. should stand longer bound, (or imprisoned,) let him come forth and he shall be heard, for he stands upon his discharge.

No. 312.

DISCHARGE.

Hear ye, hear ye, hear ye. No cause being shown why A. B. should longer remain in custody of the sheriff of the county of he is discharged.

No. 313.

FOR AN ADJOURNMENT.

Hear ye, hear ye, hear ye. All manner of persons who have any further business to do at this court, may depart hence and appear here again to-morrow morning at o'clock, to which time this court is adjourned.

No. 314.

ON OPENING COURT AFTER AN ADJOURNMENT.

Hear ye, hear ye, hear ye. All manner of persons who have been adjourned over to this hour, and have any further business to do at this court, may draw near and give their attendance and they shall be heard.

No. 315.

FOR FINAL ADJOURNMENT.

Hear ye, hear ye, hear ye, This court is adjourned without day.

FORMS FOR CORONERS.

No. 316.

ASSIGNMENT OF DISTRICTS IN WHICH CORONERS TO ACT IN NEW YORK.

See § 911.

City and county of New York, ss. I, the mayor of the said city, in pursuance of the statutes of this state, relative to the assignment of the districts in which the coroners of the said city shall exercise the duties of their office, do hereby assign the several senate districts of the said city to the following persons, who were elected such coroners at the last general election, as follows: The senate district to A. B.; the senate district to C. D.; the senate district to E. F.; and the senate district to G. H. Dated, &c.

A. O. H., Mayor of New York.

No. 317.

SUBPENA FOR WITNESS.

• [See § 952.

The People of the State of New York to

We command you and each of you, that all business and excuses being laid aside, you be and appear before the undersigned, one of the coroners of the county of at on the at . in the forenoon, (or forthwith) to testify upon an inquest then and there to be had upon the body of deceased, (or upon the body of a person whose name is unknown) and hereof fail not at your peril.

Witness the hand of said coroner this day of 187

A. B., Coroner.

No. 318.

ATTACHMENT AGAINST A WITNESS.

See § 952.

The People of the State of New York, to the Sheriff, or to any Marshal or Constable of the county of :

We command you that you attach and bring him before the

undersigned, one of the coroners of said county, at in said county, forthwith, to testify upon a certain inquest (as in the subpœna) and also to answer all such matters as shall be objected against him, for that he having been duly subpœnaed to attend upon such inquest, has refused, or neglected to attend in conformity to such subpœna, and have you then there this writ.

Witness the hand of the said coroner this day of 187

A. B., Coroner.

No. 319.

RETURN TO THE ATTACHMENT.

I have arrested the within named and have him in my custody now here, as I am within commanded. Dated 187

C. D., Sheriff.

No. 320.

OATH TO THE FOREMAN OF JURY.

You do swear that you will well and truly inquire how and in what manner and when and where, the person lying here (or whose body you have just viewed, as the case may be,) came to his death (or was wounded) and who such person was, and into all the circumstances attending such death (or wounding) and by whom the same was produced; and that you will make a true inquisition thereof, according to the evidence offered to you, or arising from the investigation of the body: so help you God.

No. 321.

OATH TO THE JURORS.

The same oath which A. B., the foreman of this inquest hath on his part taken, you and each of you do now take, and shall well and truly observe and keep on your part: so help you God.

No. 322.

OATH TO WITNESS.

The evidence you shall give upon the inquest touching the death (or wounding) of (or of the person whose body has been viewed) shall be the truth, the whole truth, and nothing but the truth: so help you God.

No. 323.

OATH TO INTERPRETER.

You shall truly interpret to the witness the oath that shall be administered to him, upon this inquest; and shall also truly interpret between the coroner, the jury (and the counsel) and the witness: so help you God.

No. 324.

INQUISITION.

See § 949.

STATE OF NEW YORK, }
County of } ss.

Inquisition taken at, &c., on, &c., before one of the coroners of said county, upon view of the body of (or person unknown) then and there lying dead (or wounded) upon the oath of E. F., G. H., J. K., &c., good and lawful men of the said county, who being duly summoned and sworn to inquire into all the circumstances attending the death (or wounding) of the said (or person unknown) and by whom the same was produced, and in what manner, and when and where the said came to his death (or was wounded) do say upon their oaths, aforesaid, that ' the deceased came to his death,'²

and so the said jurors say that the said killing of the deceased by the said was murder (or manslaughter) in the degree.³

In witness whereof, as well the said coroner as the jurors aforesaid, have to this inquisition set their hands and seals, on the day of the date hereof.

C. D., Coroner. (L. s.)

E. F., Foreman. (L. s.)

Jurors.

G. H., (L. s.)

&c., &c.

No. 325.

INQUISITION WHERE THE KILLING IS MURDER IN THE FIRST DEGREE.

See § 918.

After ² insert,

From a wound in the left lung inflicted by one with a knife (pistol shot, blow of a club, slung shot, &c., &c.) at, &c., on, &c.; which wound was given by the said with the premeditated design of effecting the death of the deceased.

Or, from taking arsenic given to the deceased by one in a

cup of coffee, with the premeditated design of poisoning or effecting the death of the deceased.

Or, from a pistol shot recklessly fired without cause or provocation by one into a crowd in which the deceased was quietly standing at, &c., on, &c.; the ball from which entered the brain of deceased, from which wound he instantly (or on the day of) died.

Or, from a blow on the head from a club, (slung shot, &c.) inflicted by one while attempting to escape from the deceased who had seized him while he the said was firing the dwelling of the deceased.

No. 326.

INQUISITION WHERE THE KILLING IS MURDER IN THE SECOND DEGREE.

See § 918.

After ' insert,

From a blow on the head inflicted by one (or some persons unknown to the jury) while endeavoring to escape from the deceased who had seized him in the act of robbing his dwelling.

No. 327.

INQUISITION WHERE THE KILLING IS MANSLAUGHTER IN THE FIRST DEGREE.

See §§ 924, &c.

Insert in place of part between ' and ';

The said came to his death from a stone thrown by E. F. at the house of said with the design of frightening the occupants, but without design to kill any one.

No. 328.

INQUISITION WHERE THE KILLING IS MANSLAUGHTER IN THE SECOND DEGREE.

See §§ 928.

insert in place of part between ' and ';

The said came to her death by means of medicines administered to her by E. F. while she was pregnant, with the intention of procuring the miscarriage of the said

No. 329.

INQUISITION WHERE THE KILLING IS MANSLAUGHTER IN THE THIRD DEGREE.

See § 931.

Insert in place of part between ¹ and ²,

The said came to his death from a blow given by E. F. with a club in the heat of passion, without any design to effect death.

No. 330.

INQUISITION UPON THE BODY OF AN INFANT.

Insert in place of the part between ¹ and ²,

That the body is the child of an unmarried woman, of which she was secretly delivered and was born alive; and the said with the intent to destroy the same, wrapped and folded it in a cloth by means of which it was suffocated and died.

Or, threw the same into the river by means of which it was drowned.

Or, threw the same into a privy, by means of which the same was suffocated and died.

Or, the said C. D. in a fit of temporary insanity caused by the pains of child birth choked and suffocated the said newborn child so that it instantly died; and the jury say that the same was not done feloniously or with malice aforethought, but in the agonies of pain and not otherwise.

No. 331.

INQUISITION WHERE A PERSON IS FOUND DEAD WITH MARKS OF VIOLENCE.

Insert in place of the part between ¹ and ²,

That the body of the said was found lying in the highway near on the, &c., and that the said came to his death from a wound in the left side, which appeared to have been made with a knife, dirk or other sharp instrument (or by a gun or pistol bullet; or from a bruise upon the head, given with a club, stone or slung shot) by some person to the jury unknown.

No. 332.

INQUISITION WHERE THE KILLING IS JUSTIFIABLE HOMICIDE.

See § 940.

Insert in place of part between ¹ and ²,

A. B. being sheriff of county, (or constable, marshal or police

officer, &c.) and having lawful process for the arrest of C. D. upon a charge of felony (or an execution against the person or property of the said C. D. or a writ of ejection against the said C. D. or a warrant for the removal of the said C. D. from demised premises, &c.) did on the, &c., at, &c., attempt in a legal way to execute the said process as he was commanded; but the said C. D. and E. D. and G. D., the sons of the said C. D. violently resisted and opposed the execution of the same and assaulted and attempted to drive off the said A. B. who thereupon fired a pistol at the said C. D., by which he inflicted a mortal wound upon the neck of the said C. D., of which he instantly died; and the jurors, upon their oaths aforesaid, say that the said C. D. came to his death in the manner aforesaid, by the hand of the said A. B., in the legal and necessary attempt of the said A. B. to prevent resistance to the execution of the said process; and that the said wound was not given feloniously or with malice aforethought, but for the cause aforesaid.

Or, A. B. being sheriff of county (or constable, marshal or police officer, &c.) and having lawful process for the arrest of the said C. D. upon a charge of felony (or the said C. D. having murdered one E. F.) and the said A. B. having arrested him upon said warrant (or for the said offence, or having him in jail) the said C. D. broke away and escaped from the custody of the said A. B. and the said A. B. in order to prevent the escape of the said felon, fired, &c., (conclude as the last.)

Or, the said C. D., with E. F. and G. H. and divers other persons to the jury unknown, on at being riotously and unlawfully assembled, for the purpose of preventing the laborers and workmen on the canal (or railroad, or the operatives in the factory) from working, and with stones, clubs, guns and other weapons, did threaten the destruction of the property of the contractors on said work (or of the said factory) and the lives of such laborers and operatives; and sheriff of said county, (or mayor of the said city) in the exercise of the duties and powers conferred upon him, did call out the military to aid in suppressing such riot, and prevent the destruction of property and loss of life; and having warned and admonished said rioters then and there so unlawfully assembled to desist from the acts; but the said persons, disregarding such warning and orders of said sheriff, (or mayor) and continuing their assaults as aforesaid; and also, having attacked said military, by the discharge of stones, bricks and guns at them, the said sheriff (or mayor) did thereupon, as he lawfully might, command the said military to fire upon the said rioters; and thereupon the said

military did fire and discharge their guns at the said rioters under and pursuant to such command, and that the charge of one of said guns took effect upon the head of the said C. D., then and there so riotously engaged as aforesaid, inflicting a mortal wound upon the said C. D., of which wound he, the said C. D., then and there died; and the jurors aforesaid, upon their oaths aforesaid, say, that the said death was not committed feloniously or with malice aforethought; but necessarily and in the discharge of a lawful duty in manner aforesaid.

Or, the said C. D. at, &c., on, &c., being then and there engaged in an attempt to commit a burglary by feloniously entering the dwelling of, &c., on, &c., in the night time, one A. B., being then a police officer, (constable, marshal or watchman,) and then and there present, did attempt to prevent such burglary and felony by seizing and arresting the said C. D., but he, the said C. D., being about to escape, and the said A. B. being unable to hold and detain him, did strike the said C. D. a blow upon the head with his club, for the purpose of disabling the said C. D. and preventing such escape; and thereby inflicted a wound upon the head of said C. D., of which he instantly (or thereafter, to wit, on, &c.) died, (conclude as last.)

Or, the said C. D., on, &c., at, &c., violently and feloniously made an assault upon one A. B., with the intent to rob the said A. B. of a sum of money, in the possession of the said A. B.; by which assault, the said C. D. put the said A. B. in great bodily fear, and the said A. B. was in danger of losing said money, in the manner aforesaid; and being so in danger, he, the said A. B., for the purpose of protecting his property did draw a pocket knife and strike or stab the said C. D. in the abdomen, and thereby inflicted a wound upon the said C. D. of which he, the said C. D., instantly (or on, &c.) did die; and the jurors aforesaid, do, on their oaths aforesaid, say that the said A. B. did kill the said C. D., in manner aforesaid, not feloniously, or with malice aforethought, but in defence of his property as aforesaid.

Or, the said C. D. made a violent assault upon one A. B. with intent to kill, maim or dangerously wound the said A. B., and thereby put him, the said A. B. in imminent danger and bodily fear of his life; and the said A. B., then and there, in self defence, seized a loaded pistol (club or billet of wood, a knife or other instrument) and shot (struck or stabbed) the said C. D. in the left breast (or inflicted a wound upon the head of said C. D.) whereof he, the said C. D., instantly (or thereafter on, &c., at, &c.) died; and the jurors, upon their oaths aforesaid, say that the said shooting, (stabbing or blow)

was not done feloniously or with malice aforethought, but in self-defence.

Or, the said C. D., and other persons to the jury unknown, on, &c., at, &c., being riotously, and unlawfully assembled, and having violently and unlawfully assailed the dwelling house of one A. B., with stones, bricks, clubs and other instruments, with the intent to demolish and pull down said house (or to break into the said house) and thereby put the said A. B. and the other persons in said house in great peril and danger of their lives; and the said A. B., in defence of himself and for the preservation of the lives of the other persons in said house, and also of preventing the destruction of his house and loss and injuring of his goods, did discharge a rifle at the several persons so riotously and unlawfully assembled, and the bullet mortally wounded the said C. D. in the head, of which the said C. D. then and there instantly died; and so the jurors aforesaid, on their oaths aforesaid, do say, that the said A. B. did kill the said C. D. in manner aforesaid, in defence of himself and property, and not feloniously, or with malice aforethought.

Or, the said C. D. on, &c., at, &c., violently and wilfully and feloniously made an assault upon one A. B., the wife (or daughter) of C. B., with the intent to murder (ravish, rob, or commit some bodily harm to the said A. B.) and the said C. B. being unable to cause the said C. D. to desist from his assault upon the said A. B. discharged a pistol at the said C. D. (and conclude as the last.)

NO. 333.

INQUISITION IN CASE OF SUICIDE.

Insert in place of part between ¹ and ³,

The deceased came to his death by hanging himself at, &c., (on, &c., (or by stabbing himself with a knife, or by cutting his throat with a razor; or by blowing out his brains with a gun or pistol; or by taking a dose of arsenic with the intent and for the purpose of destroying himself; or by voluntarily drowning himself in the waters of the Erie canal; or by hanging himself by the neck in his barn.

If the person is a lunatic, add,

The said C. D. being a lunatic or person of unsound mind.

Or if the suicide was committed in a fit of temporary insanity, add,

The said C. D. being in feeble health and depressed spirits was seized with a fit of delirium.

If any one was present and aided in the self murder, add,

And the said jurors further say that E. F. of was feloniously

present and deliberately aided the said C. D. in the commission of the self murder aforesaid.

No. 334.

INQUISITION WHERE ONE HAS DIED A NATURAL DEATH

Insert in place of part between ' and ' ,

The said C. D. on, &c., at, &c., was found lying dead in the highway near the house of and that he had no mark of violence appearing upon his body ; and so the said jurors, upon their oaths aforesaid, say, that the said C. D. died by the visitation of God.

No. 335.

INQUISITION WHERE ONE IS ACCIDENTALLY DROWNED.

Insert in place of part between ' and ' ,

The said C. D., on, &c., at, &c., while bathing in the river (or fell from a boat or bridge, or while sailing in a boat on river, the same was upset, or while skating on the river the ice broke) was accidentally drowned, and so the jurors aforesaid say, that the said C. D., in manner and form and by the means aforesaid, accidentally and by misfortune came to his death, and not otherwise.

No. 336.

INQUISITION WHERE ONE ACCIDENTALLY TAKES POISON.

Insert in place of part between ' and ' ,

The said C. D., being unwell, swallowed a quantity of white arsenic through mistake, supposing the same to be

No. 337.

INQUISITION WHERE ONE IS ACCIDENTALLY CHOKED IN SWALLOWING.

Insert in place of part between ' and ' ,

The said C. D. while eating his dinner on, &c., at, &c., attempted to swallow a piece of meat which became lodged in his throat and could not be removed, but suffocated him.

No. 338.

INQUISITION WHERE THE DEATH WAS FROM OLD AGE AND WANT OF CARE AND DIET.

Insert in place of part between ' and ' ,

The said C. D. died from old age and infirmity and for want of proper care.

No. 339.

INQUISITION WHERE THE DEATH WAS FROM INTEMPERANCE AND WANT
OF FOOD.

Insert in place of part between ¹ and ³,

The said C. D. came to his death through want of food and care, while in a state of drunkenness.

No. 340.

INQUISITION WHERE THE DEATH WAS FROM DELIRIUM TREMENS.

Insert in place of part between ¹ and ³,

The said C. D. being a person of intemperate habits and addicted to intoxication was on, &c., at, &c., attacked with delerium tremens of which he then and there died.

No. 341.

INQUISITION WHERE THE DEATH WAS FROM JUMPING OR FALLING FROM
THE CARS.

Insert in place in part between ¹ and ³,

The said C. D. being a passenger (or employed) upon the rail road cars upon the rail road on the &c., he leaped (or fell) from the ears while they were in rapid motion, by means of which he was so bruised and injured that he instantly (or thereafter, to wit, on, &c.,) died.

Or, was so mutilated that it became necessary to amputate his right leg above the knee, but the said C. D. died under the operation though the same was performed in a careful and skilful manner.

No. 342.

INQUISITION ON A CHILD WHO HAD DIED BY FALLING IN FIRE, ETC.

Insert in place of part between ¹ and ³

The said C. D. being a child of years came to its death by falling into the fire (or into the cistern) on, &c., at, &c., when left alone by its mother (or nurse.)

No. 343.

FORM OF TAKING EXAMINATION OF WITNESSES BEFORE A CORONER'S JURY.

See § 920.

County of ss. Examination of witnesses produced, sworn and examined on the day of at before one of the coro-

ners of the said county, and jurors, good and lawful men of the said county, duly summoned and sworn by the said coroner to inquire how and in what manner and when and where (or person unknown) came to his death (or was wounded) and who such person was, and into all the circumstances attending such death or wounding; and to make true inquisition, according to the evidence, or arising from the investigation of the body:

G. H., being produced and duly sworn and examined, testifies, and says that (give his testimony in full.) G. H.

Subscribed and sworn before me

this day of 187

A. B., Coroner.

I do hereby certify that the foregoing testimony of the several witnesses appearing upon the foregoing inquest, was reduced to writing by me, and that the said testimony is the whole of the testimony taken on such inquest, and that the same is correctly stated, as given by the witnesses respectively. A. B., Coroner.

No. 344.

WARRANT OF CORONER FOR ARREST OF PARTY CHARGED BY THE INQUISITION WITH THE CRIME.

See § 931.

To the Sheriff, or any Constable or Marshal of the county of :

Whereas, by the inquisition of good and lawful men of said county, taken upon their several oaths before one of the coroners of said county, at the dwelling house of at C. D., is charged with having feloniously killed and murdered on the at ; you are therefore hereby commanded, in the name of the people of the state of New York, forthwith to arrest the said C. D. and bring him before me at to be dealt with according to law.

Given under my hand this day of 18

A. B., Coroner.

No. 345.

EXAMINATION OF THE ACCUSED.

County of ss. Examination of C. D. before the undersigned one of the coroners of said county, who is charged upon inquest taken before me with the murder of E. F. of at, &c. on, &c. ; the said C. D. having been arrested and brought before me to answer to said charge. And the said C. D., after having been first duly

informed by me of the charge against him and that he was at liberty to refuse to answer any question that might be put to him, and after having been allowed a reasonable time to send for and advise with counsel, to the inquiry, What is your name? He answered C. D.

What is your age? Ans.—Twenty-five years.

What is your occupation? Ans.—A farmer.

Where do you reside? Ans.—In

Did you know E. F., the deceased? Ans.—By the advice of my counsel I decline to answer any further questions.

The foregoing answers of C. D. to the several interrogatories put to him on such examination, were reduced to writing by me and were read by me to the said C. D., and were corrected by him and made conformable to what he declared to be the truth; and they contain all the answers so made by said prisoner.

A. B., Coroner.

No. 346.

WARRANT OF COMMITMENT OF PRISONER.

See § 943.

To the Sheriff, or any Constable or Marshal of the county of _____ ;
and to the keeper of the common jail of said county:

Whereas, C. D. having been charged upon inquisition taken before me, one of the coroners of said county, on _____ on the oaths of _____ with having on _____ killed and murdered one _____ and the said C. D. having been brought before me as such coroner, to answer to the said charge (and having taken the examination of said C. D.)

These are therefore, to command you, the said sheriff, constable or marshal, that you forthwith convey and deliver to the said keeper of the said jail, the body of the said C. D.: and you, the said keeper, are hereby required to receive the said C. D. into your custody in the said common jail, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal at the _____ of the said _____ county,
the _____ day of 187 _____

A. B., Coroner. (L. s.)

No. 347.

RECOGNIZANCE BY WITNESSES.

County of _____ ss. Be it remembered, that on this _____ day of
187 _____ A. B., C. D. and E. F., of the town of _____ in said county,
personally came before me, G. H., one of the coroners of said county,

UPON WHOM FOUND.

ARTICLES FOUND.

DISPOSITION THEREOF.

A. B.

Gold watch, chain and key,
two gold finger rings, and \$2
in specie.

Delivered to co. treasurer.

C. D.

One coat, one hat,
one pair pantaloons.Delivered to legal
representatives of C. D.

A. B., Coroner.

County of ss. A. B., one of the coroners of the said county, being duly sworn, says, that the foregoing statement and inventory of all the moneys and other valuable things found with or upon all persons on whom inquests have been held, by and before him, within the time specified in such statement and inventory, and of the disposition thereof, is in all respects just and true to the best of his knowledge and belief; and that the moneys and other articles mentioned in such statement and inventory, have been delivered to the treasurer of the county of and to the legal representatives of the persons therein mentioned, as therein stated.

Subscribed and sworn before me
this day of 187

A. B.

FORMS FOR CONSTABLES.

No. 350.

NOTICE OF ELECTION OF CONSTABLE BY TOWN CLERK.

See § 1010.

To A. B.

Sir: You are hereby notified that you were duly elected to the office of constable of the town of at the last town meeting held therein.

Dated

C D., Town Clerk.

No. 351.

APPOINTMENT OF A CONSTABLE TO FILL A VACANCY.

See § 1007.

Town of }
County of } ss.

The said town of in said county, having at its last annual town meeting failed to elect the number of constables to which the said town is by law entitled, to wit: the number of five constables; and in consequence of such failure, there being one vacancy in said

office of constable of the said town,* we, the undersigned, three of the justices of the peace in and for the said town, do by this our warrant hereby appoint of the said town, to fill the said vacancy, to hold and exercise the duties of the said office until another person is chosen, or appointed in his place.

In witness whereof we have hereunto set our hands and seals, this
 day of 18

A. B. (L. s.) } Justices of the
 C. D. (L. s.) } Peace of the
 E. F. (L. s.) } town of

No. 352.

APPOINTMENT IN CASE OF REMOVAL, ETC.

See § 1008.

Town of }
 County of } ss.

A vacancy in the office of constable of said town having occurred by the failure of A. B., elected thereto at the last annual town meeting in said town, to qualify within the time prescribed by law (or by the death, removal from the town, resignation, or removal from office of) (conclude as No. 351, from asterisk.)

No. 353.

WHERE A JUSTICE OF ANOTHER TOWN IS ASSOCIATED TO APPOINT IN CASE OF VACANCY.

See § 1008. ¶

After describing the character of the vacancy, as in No. 352, add : And we, A. B. and C. D., being the only justices of the peace of the said town, have associated with us E. F., a justice of the peace of the town of in said county, which last mentioned town adjoins said town of ; and we, being such justices as aforesaid, do, &c., (as in No. 352.)

No. 354.

CERTIFICATE OF JUSTICES REMOVING CONSTABLE.

See § 1018.

Town of }
 County of } ss.

We, the undersigned, three of the justices of the peace of the said

town, having upon the complaint of against one of the constables of the said town, for certain misconduct in such office, in not paying over moneys collected by him, duly summoned the said to appear before us at, &c., on, &c., to show cause why he should not be removed from the said office; and the said parties appearing and being fully heard (or the complainant appearing and the said neglecting and refusing to appear) we do adjudge and declare, from the proofs before us, that the said complaint as charged is established to our satisfaction; and we do therefore hereby remove the said from the office of constable of the said town; and the cause of the said removal is, that on the day of an execution was issued by one of the justices of the peace in said town, at the suit of against for damages and costs, and delivered to said for execution; and that afterwards, to wit: the said levied and collected the said moneys and appropriated the same to his own use, and that judgment has been recovered against the said and his surety for the said moneys.

Dated

A. B. (L. S.) }
C. D. (L. S.) } Justice, &c.
E. F. (L. S.) }

No. 355.

CERTIFICATE INDORSED BY CLERK ON COPY SERVED.

I certify that the within is a true copy of the instrument in writing, filed with me this day by the justices therein named, removing you from the office of constable of said town. Dated

A. B., Clerk of the town of

To E. F., Constable of the town of

No. 356.

RESIGNATION OF CONSTABLE.

See § 1015.

To Justice of the Peace of the town of in the county of
I hereby resign the office of constable of the town of

No. 357.

ACCEPTANCE OF RESIGNATION.

See § 1015.

Town of }
County of } ss.

A. B., constable of the town of having tendered to us, three

justices of the said town, his resignation of constable of said town ; and it appearing to us that the said constable can no longer discharge the duties of said office by reason of ill health, we do, in pursuance of the statutes in such case, hereby accept the resignation of said as such constable. Dated

No. 358.

NOTICE TO TOWN CLERK OF ACCEPTANCE OF RESIGNATION.

To A. B., Esq., Clerk of the town of

Take notice that we, three of the justices of the said town, have accepted the resignation of as constable of said town, as will appear by our certificate hereto annexed. Dated

No. 359.

CONSTABLE'S BOND.

See § 1012.

A. B. chosen (or appointed) constable of the town of in the county of and C. D. and E. F. as his sureties, do hereby jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection.

Dated the day of 18

A. B. (L. s.)

Executed in the presence of

C. D. (L. s.)

G. H., Supervisor,

E. F. (L. s.)

or I. J., Town Clerk.

No. 360.

APPROVAL TO BE INDORSED THEREON.

See § 1013.

I approve of the sufficiency of the within named sureties.

Dated 18

G. H. Supervisor,
(or I. J., Town Clerk)

No. 361.

RETURN TO SUMMONS WHERE PERSONALLY SERVED.

See § 1033.

Personally served day of 187

A. B., Constable.

Fees,

No. 362.

RETURN WHERE COPY SUMMONS IS DELIVERED TO DEFENDANT.

Personally served day of 187 and copy delivered
to defendant.

A. B. Constal.

No. 363.RETURN WHERE DEFENDANT NOT FOUND AND COPY SUMMONS LEFT AT
HIS RESIDENCE.

See § 1033.

Defendant not being found, served the day of 187
by leaving a copy at his last place of abode in the presence of C. D.
his wife, who was of suitable age, and was informed by me of
its contents.

A. B. Constable.

No. 364.

RETURN WHERE THERE ARE SEVERAL DEFENDANTS.

See § 1033.

Personally served on C. D. on 187 and on E. F. on
187.

A. B., Constable.

No. 365.

RETURN WHERE ONE OF THE DEFENDANTS NOT FOUND.

Personally served on C. D. the 187 E. F. not found in
my county.

A. B., Constable.

No. 366.

RETURN OF SERVICE ON ONE PERSONALLY AND ON ANOTHER BY COPY.

See § 1033.

Personally served on C. D 187 and on E. F. by leaving on
same day at his last place of abode with F. F. his wife, of suitable
age, who was informed by me [of its contents, said E. F. not being
found in the county

A. B. Constable.

No. 367.

RETURN OF SAME ON A CORPORATION.

See § 1033.

Served 187 by delivering to C. D. personally a copy thereof,
 who is of the within corporation.

A. B., Constable

No. 368.RETURN WHERE THE CORPORATION HAS NOT DESIGNATED A PERSON
ON WHOM SERVICE TO BE MADE.

See § 1003.

Served 187 on the defendant by delivering a copy personally to C. D. a person acting within this state as the agent for said insurance company (or doing business for said company within this state, or the local agent of the within named express company in the town of in said county, or the superintendent of repairs of said railroad in this county) no person having been designated by said corporation upon whom a summons may be served, and there being no officer of said company who resides in the county of

A. B., Constable.

No. 369.RETURN WHERE THE CORPORATION HAS DESIGNATED A PERSON ON
WHOM SERVICE MAY BE MADE.

Served on the defendant 187 by delivery to C. D., personally, a copy, he being the person designated by the defendant on whom process may be served.

A. B., Constable.

No. 370.

RETURN IN CASE OF ATTACHMENT.—INVENTORY OF GOODS ATTACHED.

See § 1035.

In Justice's Court.—W. H. P., Justice.

E. F. }
 ag't
 G. M. }

Inventory of the property attached by me this day of
 187 under and pursuant to the within (or annexed) attachment in

this action at in the county of

10 M. feet hemlock plank, &c.

A. B., Constable.

No. 371.

CERTIFICATE TO COPY OF ATTACHMENT.

I certify that the within (or above) is a correct copy of the attachment delivered to me for execution at the suit of E. F. against G. H.

Dated 187

A. B., Constable.

No. 372.

CERTIFICATE TO INVENTORY.

I certify that the within (or above) is a correct copy of the inventory of the property attached by me under and the attachment in the action mentioned in said inventory and with a copy of which attachment you be herewith served.

A. B., Constable.

No. 373.

RETURN TO ATTACHMENT.

See § 1041.

By virtue of the within attachment I did on the day of 187
attach and take into my custody at in the county of the goods
and chattels mentioned in the inventory, a copy of which is hereto
annexed and on the same day, immediately after, I made the said
inventory and served a copy of the within attachment &c., and said
inventory duly certified by me on the said defendant at in said
city. Dated

A. B., Constable.

No. 374.

PROPERTY TAKEN, DEFENDANT ABSENT AND NO RESIDENCE IN THE
COUNTY.

See § 1042.

By virtue of the within attachment, I did on the day of 187
attach and take into my custody the goods and chattels of the defendant
mentioned in the inventory, a copy of which is hereto annexed at
in the county of and on the same day, immediately thereafter, I
made the said inventory, &c., and made diligent inquiry for the said

*

defendant and for his last place of residence, but could not find him in the county of nor that he had any last place of residence in the county, and I thereupon left a copy of the said attachment and said inventory with at in said county in whose possession I found the said property.

Dated

A. B., Constable.

No. 375.

WHERE THE DEFENDANT GIVES BOND AND GOODS RETURNED.

See § 1042.

After reciting as in one of the above forms, according to the fact the attaching of the property and the service of the papers, add:

And the defendant E. F. having given me the bond herewith returned I delivered the property so attached, to him.

Dated

A. B., Constable.

No. 376.

WHERE A CLAIMANT GIVES THE BOND AND THE GOODS DELIVERED TO HIM.

See § 1042.

After reciting as in one of the above forms, according to the fact, the attaching of the property and the service of the papers, add:

And J. K., having claimed the property and delivered me the bond herewith returned, I delivered the same to him.

Dated

A. B., Constable.

No. 377.

DEFENDANT NOT FOUND, COPIES LEFT AT HIS RESIDENCE.

See § 1042.

By virtue of the within attachment I did on the day of 187 attach and take into my custody at in the county of the goods and chattels mentioned in the inventory, a copy of which is hereto annexed, and on the same day, immediately after, I made the said inventory and made diligent inquiry for the said defendant, but could not find him in the said county, and that I then left a copy of the within attachment and of the said inventory duly certified by me, at the last place of residence of the said defendant in said county.

Dated

A. B., Constable.

No. 378.

BOND TO PREVENT REMOVAL OF GOODS ATTACHED.

See §§ 1037, 1039.

Know all men by these presents, that we of, &c., are held and firmly bound unto A.B. in the sum of dollars (penalty to be double the sum stated in the attachment to have been sworn to be due by the plaintiff) to be paid to the said A. B. or to his certain attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the day of

The condition of this obligation is such that if certain goods and chattels, to wit: which have been seized by the above named A. B., Constable, by virtue of an attachment issued by in favor of against the above bounden shall be produced to satisfy any execution that may be issued upon any judgment which shall be obtained by the plaintiff upon the said attachment within six months after the date hereof, then this obligation to be void; otherwise to remain in full force.

Sealed and delivered in the
presence of

(L. S.) &c.

No. 379.

OATH TO SURETY.

County of ss. being sworn, says, that he is a resident of county, and a householder or freeholder therein, and is worth the sum of over and above all debts and liabilities, and property exempt from levy and sale on execution; and further saith not.

Subscribed and sworn before me

this day of 187

A. B., Constable.

No. 380.

APPROVAL BY CONSTABLE.

I approve of the sufficiency of surety to the within bond
A. B., Constable.

No. 381.

BOND BY CLAIMANT TO PLAINTIFF.

See §§ 1037, 1039.

(Penal part as last, but to the plaintiff, by name, instead of the constable. The penalty double the value of the property attached.)

Whereas, certain goods, to wit, _____ were on the _____ day of _____ seized by A. B., constable, by virtue of an attachment issued by _____ a justice of the peace of the county of _____ in favor of the above named E. F. and against G. H.; and whereas the above bounden J. K., claims the goods as his property:

Now therefore, the condition of this obligation is such that if in a suit to be brought on this obligation within three months from the date hereof, the said J. K. shall establish that he was the owner of the goods, at the time of the said seizure; and in case of his failure to do so, if the said J. K. shall pay the value of the said goods and chattels with interest, then this obligation to be void; otherwise to remain in full force.

Sealed and delivered in

the presence of _____

This bond is to be approved by the constable or the justice. When the approval is by the constable it may be in the same form as the last, and the oath to the surety may be the same. One surety will be sufficient to the first bond, but there must be two to this bond.

No. 382.

RETURN OF SERVICE OF WARRANT WHERE DEFENDANT ARRESTED AND PLAINTIFF NOTIFIED.

See § 1049.

Arrested defendant and have him in custody before the court.
Plaintiff notified.

Dated 187 _____

A. B., Constable.

No. 383.

RETURN OF ARREST, PLAINTIFF NOT NOTIFIED.

See § 1049.

Defendant arrested and have him before the court in custody.
Plaintiff not notified.

Dated _____

A. B., Constable.

No. 384.

RETURN, DEFENDANT NOT FOUND.

See § 1049.

Defendant not found in the county of

Dated 187

A. B., Constable.

No. 385.

RETURN OF ARREST OF ONE DEFENDANT AND OTHER NOT FOUND.

Defendant C. D. arrested and have him in custody before the court; the defendant E. F., not found in the county. Plaintiff notified.

A. B., Constable.

No. 386.

RETURN OF ARREST, AND DETENTION OF CANAL BOAT.

See § 1051.

Defendant arrested and have him in custody before the court, and plaintiff notified; and have seized and hold the within named canal boat furniture and horses.

Dated

A. B., Constable.

No. 387.

NOTICE TO PLAINTIFF OF ARREST OF DEFENDANT.

In Justices Court.—W. H. P., Justice.

C. D. }
 v. }
 E. F. }

To C. D., above plaintiff:

Take notice that I have arrested the defendant under the warrant in this cause, and have him now in custody before the court.

Dated 187

A. B., Constable.

No. 388.

RETURN IN REPLEVIN WHERE PROPERTY TAKEN AND DEFENDANT PERSONALLY SERVED.

See § 1054.

By virtue of the annexed affidavit and order indorsed thereon, I did on the day of 187 take the property described in the said affidavit. (If all the property not found, insert in the place

of above the following property, apart of the property described in said affidavit : and that after diligent search, the remainder of such property could not be found.) And I further return that on the same day (or on the day of) without delay I served on the within named defendant the within summons, notice and affidavit with indorsed order, by delivering to him personally a true copy of each of them.

Dated 187

A. B., Constable.

No. 389.

WHERE THE DEFENDANT CANNOT BE FOUND.

After stating the fact as to the taking the property as above, add :
And after diligent search I could not find the said defendant in the county of and that thereupon without delay on the day of
187 I served the within summons, notice and affidavit with indorsement thereon, by leaving a copy of each of them at the usual place of abode of said defendant in the town of in said county, with the wife of said defendant, being a person of suitable age and discretion.

Dated 187

A. B., Constable.

No. 390.

WHERE THE PROPERTY IS TAKEN, DEFENDANT NOT FOUND AND SERVICE ON AGENT.

After describing the taking and search for defendant as in the last form, add :

And that thereupon without delay on the day of 187 I served the within summons, notice, and affidavit with indorsement thereon by delivering a copy of each of them personally to C. D., the agent of the said defendant, and in whose possession I found the said property.

Dated 187

A. B., Constable.

No. 391.

WHERE THE PROPERTY IS TAKEN AND DEFENDANT A NON RESIDENT HAVING NO AGENT.

Describe the taking as before, and inquiry for defendant, and add :

And the said defendant has no last place of abode in the said county, and no agent in said county, on whom service of the summons, notice, affidavit, and indorsement could be made.

A. B., Constable.

No. 392.

WHERE PROPERTY IS CLAIMED BY THIRD PERSON AFTER TAKEN.

Describe the taking and serving of the papers according to the first, as provided in each of the above forms, and add:

And on the day of 187 , E. F. of made claim to said property and he at the same time served on me an affidavit required in such case, and that thereupon and on the day of I notified the plaintiff C. D. of such claim and at the same time demanded of said plaintiff that he should indemnify me against the same ; and that the plaintiff refused to execute the undertaking required by law, and I did thereupon, on the day of 187 return the property so taken to the said defendant.

A. B., Constable.

No. 393.

WHEN THE PLAINTIFF INDEMNIFIES AGAINST THE CLAIM OF A THIRD PARTY.

State the proceedings according to the fact, in the last form, down to the demand of an indemnity from the plaintiff, and add

And the said plaintiff thereupon, on the day of 187 indemnified me against said claim by executing and delivering to me the undertaking given in such case.

Dated

A. B., Constable.

No. 394.

WHERE THE PROPERTY IS NOT FOUND.

By virtue of the annexed affidavit and of the order indorsed thereon, I have made diligent inquiry and search for the property described in the said affidavit within the county of and I have been unable to find the same or any part thereof.

Dated 18

A. B., Constable.

No. 395.

INDEMNITY BY PLAINTIFF TO CONSTABLE WHERE CLAIM IS MADE TO PROPERTY.

See § 1056.

(Title of action.)

Whereas C. D. claims to be the owner of and to have the right of

possession of the following personal property, to wit: which has been taken by A. B., constable of the town of in county upon the affidavit and order of said justice of the peace, and has served on the said A. B. an affidavit of his title thereto and right of possession thereof, and stating the grounds of such right and title. Now therefore, we, C. D. and E. F. of merchants, do undertake and agree to indemnify the said A. B. against such claim.

C. D.

E. F.

County, ss. C. D. and E. F. being severally duly sworn, each for himself, deposes and says that he is a householder and freeholder residing in in said county, and is worth dollars over and above all debts, and liabilities, and property exempt from levy and sale on execution.

Subscribed and sworn before me

C. D.

this day of 187

E. F.

To be acknowledged as No. 101.

No. 396.

RETURN TO A VENIRE.

See § 1061.

I certify that by virtue of the within precept, I have personally summoned as jurors the several persons named in the annexed list.

Dated 18

A. B., Constable.

No. 397.

INDORSEMENT OF LEVY ON EXECUTION.

See § 1083.

Levied by virtue of the within execution this day of 18 on two cows, three two year old heifers, the property of the defendant, on his premises in

A. B., Constable.

No. 398.

INVENTORY WHERE ARTICLES ARE NUMEROUS.

See § 1083.

Inventory of goods and chattels levied on this day of and taken into my custody by virtue of the annexed execution, viz.: one hundred saw logs, &c. &c.

A. B., Constable.

No. 399.

INDORSEMENT ON EXECUTION IN SUCH CASE.

See § 1083.

I have levied this day of 18 by virtue of the within execution, upon the goods and chattels of the defendant, mentioned in the annexed inventory.

A. B., Constable.

No. 400.

RETURN OF AN EXECUTION SATISFIED.

See § 1092.

I have made the amount of the within execution of the goods and chattels of the defendant. Dated

(Or "satisfied.")

A. B., Constable.

No. 401.

RETURN OF SATISFIED IN PART.

See § 1092.

I have made the sum of of the goods and chattels of the within defendant, and can find no other goods and chattels of said defendant, whereof I can make the remainder of the said execution.

Dated

A. B., Constable.

No. 402.

RETURN OF NO PROPERTY, OR NULLA BONA.

See § 1092.

No goods or chattels of the within defendant can be found.

Or, nulla bona.

A. B., Constable.

No. 403.

NEITHER GOODS NOR BODY.

No goods or chattels, nor the body of the within defendant can be found.

No. 404.

NO GOODS, AND THE DEFENDANT ARRESTED.

No goods or chattels of the within defendant can be found, and for

want thereof I have arrested the defendant, and have conveyed his body to the common jail of the county.

No. 405.

CERTIFICATE OF COPY OF EXECUTION LEFT WITH JAILER.

See §§ 586, 1088.

I certify that the within is a true copy of the execution under and by virtue of which I deliver to the custody of the sheriff of the county of _____ at the jail of said county, this day, the body of the within named defendant; and that my fees thereon are \$

No. 406.

RETURN WHERE GOODS REMAIN UNSOLD.

Levied on a lumber wagon, the property of the within defendant, which remains in my possession unsold, for want of bidders.

Dated

No. 407.

WHERE AN APPEAL IS BROUGHT.

See § 1094.

Proceedings stayed by appeal.

No. 408.

OF THE SERVICE OF A SUMMONS UNDER HIGHWAY LAWS.

See § 1022.

Personally served 187

A. B., Constable.

Or, served by leaving a copy at the personal adode of the within named _____ with a person thereat of suitable age and discretion, he not being found. A. B., Constable.

No. 409.

WHEN SERVED ON A CORPORATION.

See § 1022.

Served on the within corporation, by delivering a copy of the same to _____ the president of said corporation, personally, this _____ day of _____

No. 410.

RETURN TO JUSTICE'S SUMMONS UNDER LAWS FOR OPENING HIGHWAYS.

See § 1124.

I have summoned the several jurors whose names are within mentioned personally, except C. D., one of said jurors, who could not be found; and I made service on said C. D. by leaving a notice that he was drawn to serve as such juror, and stating the time and place of attendance, at his place of residence, with a person of suitable age and discretion.

No. 411.

RETURN TO A PRECEPT IN CASE OF AN ENCROACHMENT

See § 1127.

I have, by virtue of the within precept, summoned the following named persons as jurors, as I am within commanded, to wit:

Dated A. B., Constable.

No. 412.

NOTICE TO OCCUPANT AND COMMISSIONERS IN SUCH CASE.

See § 1128.

Take notice, that the jury to try the question of the alleged encroachment of the fence on the land of the said will meet at
on, &c. Yours, &c. A. B., Constable.

To commissioners of highways of the town of
 C. D., occupant of the land on which is alleged encroachment.

No. 413.

RETURN TO SUMMONS IN CASE OF DRAINING SWAMP.

See § 1131.

I have summoned the following named persons to serve as a jury in the matter within named, on or before the day of to wit:
 and I also gave notice to the owner of the lands through which
 the ditch is to be cut, on the day of of the time and place at
 which such jury would appear.

No. 414.

NOTICE TO PARTIES.

See § 1131.

Take notice, that a jury will appear on the day of at
o'clock, upon the lands of in the town of and known as
to determine whether a ditch or drain is necessary or proper to
drain any of such lands, and the damages that the owners thereof
will sustain, in consequence of the cutting of such ditch.

A. B., Constable.

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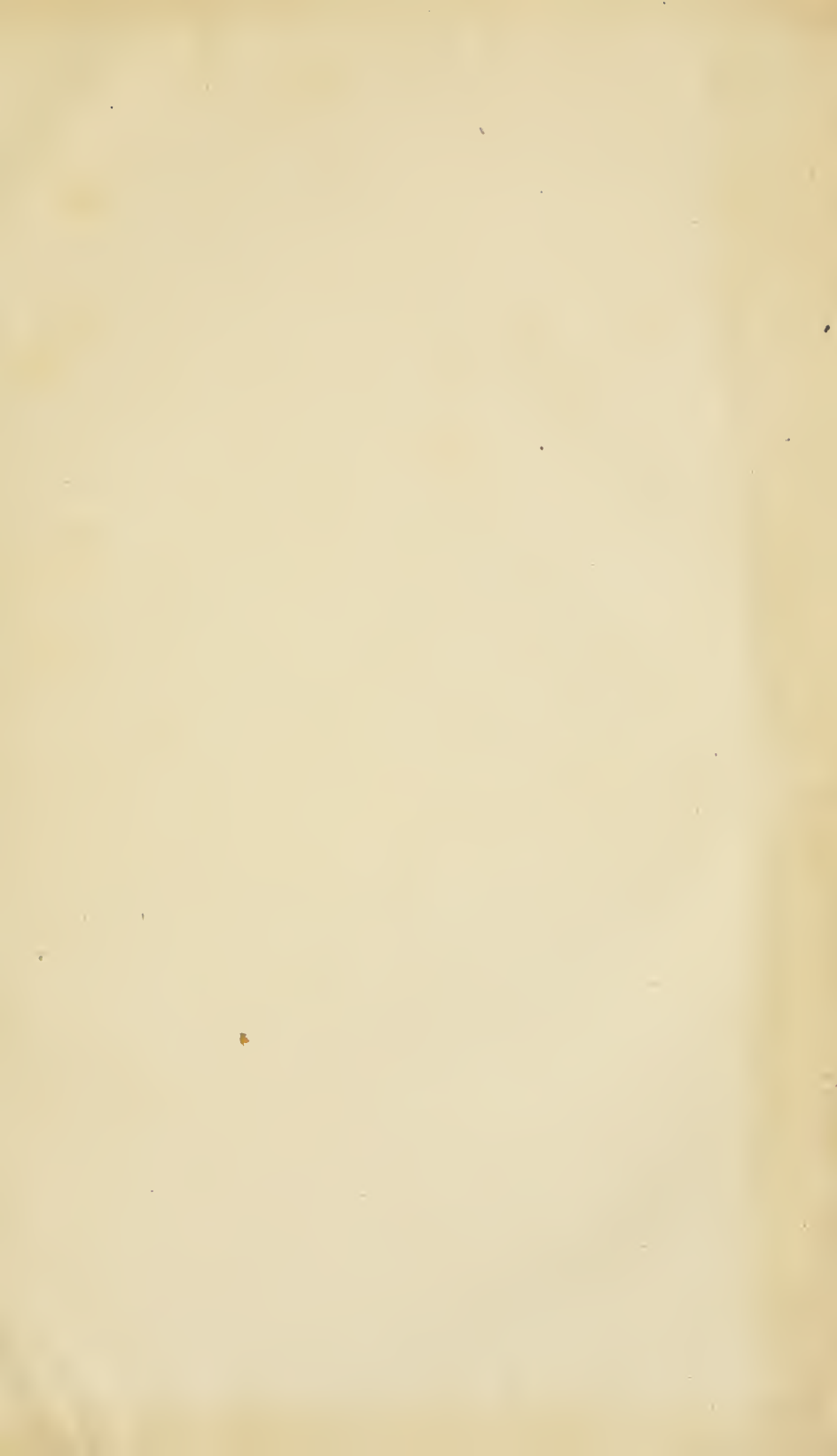
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